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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL MEDICAL ENTERPRISES, INC.,
Petitioner,

vs.

DAVID K. BLEASDELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a discharged employee in an employment discrimination case must show *both* that the reason for his termination was false *and* that discrimination was the real reason for his termination in order to establish pretext to survive the employer's motion for summary judgment. In other words, is *pretext-plus* the proper standard for summary judgment under the *McDonnell Douglas* burden-shifting analysis?

Whether a former supervisor's disagreement with an employer's decision to terminate an employee creates a triable issue of fact as to whether the employer's stated reasons for the employee's termination were false, where the former supervisor does not refute the facts in the case.

RULE 29.6 LISTING

National Medical Enterprises, Inc. ("NME"), has no affiliates, parents or subsidiaries that have publicly issued shares. However, NME has formally changed its name to Tenet Healthcare Corporation, the shares of which are publicly traded.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

National Medical Enterprises, Inc., *Petitioner*,

vs.

David K. Bleasdell, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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National Medical Enterprises, Inc. ("NME"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is unreported. The opinion of the district court (App., *infra*, 14a-44a) is also unreported.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on September 11, 1997. NME's Petition for Rehearing was denied, and its suggestion for rehearing en banc was rejected, on November 7, 1997. (App., *infra*,

45a-46a.) The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides, in pertinent part, that "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

STATEMENT OF THE CASE

A. Relevant Facts

This action involves a terminated employee's claim for age discrimination. Respondent David K. Bleasdell ("Bleasdell") was employed by NME as a corporate pilot in NME's Aviation Department. Bleasdell was hired in August 1980, at the age of 42. After some time with NME, Bleasdell became a Pilot-in-Command, thus having final authority for flying and landing very sophisticated and expensive aircraft. (ER 20, Declaration of Walter Kraujalis ("Kraujalis Decl."), ¶ 4; SER 60, Deposition of David K. Bleasdell ("Bleasdell Depo"), pp. 161-65.) As a Pilot-in-Command, it was critical for Bleasdell to have the unwavering confidence and trust of the NME executives who flew with him. (SER 60, Bleasdell Depo, pp. 161, 163-65.) However, over a period of eighteen months prior to Bleasdell's termination, Bleasdell was involved in a series of incidents that caused NME management to lose confidence and trust in his abilities and judgment.

On July 5, 1990, Bleasdell was the Pilot-in-Command of a flight that nearly crashed on landing when Bleasdell failed to immediately take control of the aircraft, as he could have done, from the subordinate pilot who was flying the plane and had lost control. (SER 60, Bleasdell Depo, pp. 273-82, 290.) In April 1991, Bleasdell was again Pilot-in-Command on a flight that nearly crashed when he landed the plane too hard, causing it to bounce off the runway and forcing him to abort the landing. (SER 60, Bleasdell Depo, pp. 294-96; ER 20, Kraujalis Decl., ¶ 5.) Richard Eamer, the chairman of the board and chief executive officer of NME, was a passenger on the April 1991 flight. When Eamer asked what had happened, Bleasdell lied about the cause of the near-crash: rather than admitting that it was his fault, Bleasdell falsely stated that something had blown across the runway. (SER 60, Bleasdell Depo, pp. 296-97.) Eamer later found out that he had been lied to by Bleasdell. In addition, in September 1991, Eamer overheard Bleasdell lying to the head of NME's travel department about how late he had arrived at the airport for a flight.[1] As a result of these episodes, Eamer had lost all confidence in Bleasdell's abilities and judgment.

Bleasdell's supervisor at the time of these incidents was Robert Metz, the manager of the Aviation Department. Even though Metz was well aware of each of the above occurrences, he failed to discipline Bleasdell in any way. Metz admits that the near-crash incidents did occur and that,

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[1] Bleasdell contends that Eamer is partially deaf and, as such, he may have been mistaken about this particular incident. However, the only fact that is germane to this action is undisputed: Eamer believed Bleasdell was lying.

during the first incident, Bleasdell "could have taken control . . . a few seconds sooner than he did." (ER 32, Declaration of Robert Metz ("Metz Decl."), ¶¶ 13, 20, 23, 24.) Metz also admits that Bleasdell lied to Eamer about one of the near-crashes. (ER 32, Metz Decl., ¶ 14.) However, Metz disagreed that the actions taken by NME in terminating Bleasdell were warranted. (ER 32, Metz Decl., ¶ 44.) As a result of these problems, and in an effort to improve the overall quality and safety of the Aviation Department, Eamer demoted Metz and promoted Walter Kraujalis to the position of Aviation Department manager.

In January 1992, after evaluating the Aviation Department personnel, Kraujalis terminated Bleasdell for his role in the two near-crashes and for the aforementioned acts of dishonesty; Kraujalis felt that Bleasdell could not be trusted to exercise good judgment in critical cockpit situations or to honestly report events concerning aircraft and passenger safety. Along with Bleasdell, who was now 52 years old, NME terminated three other Aviation Department employees: the 42-year-old co-pilot who was involved in the first near-crash, a 24-year-old maintenance assistant, and a 28-year-old flight attendant. Bleasdell was replaced by Walter Huestis, then 46 years old, who was a former naval pilot who had previously been responsible for transporting high ranking government officials. (ER 20, Kraujalis Decl., 13.)

In his complaint, Bleasdell contends that he was discriminated against because of his age. However, Bleasdell admits that he never heard any NME supervisors make any statement reflecting a bias against older persons. (SER 60, Bleasdell Depo, p. 169.) Furthermore, Bleasdell does not dispute that the near-crashes occurred, or that he

lied to Eamer on one occasion, and was believed to have lied on another. Other than his own declaration, the only evidence that Bleasdell offered in opposition to NME's motion for summary judgment was the declaration of Metz, his former supervisor who had been demoted for his handling of the mishaps in question. Like Bleasdell, Metz offered his opinion that he disagreed with NME's decision to terminate Bleasdell, but more importantly, he also did not dispute the occurrence of the incidents that formed the basis of NME's decision. In other words, Bleasdell presented no evidence that NME's reasons for his termination were false, or that NME discriminated against Bleasdell due to his age.

B. Procedural History

On January 14, 1994, Bleasdell filed his original complaint in California Superior Court in Los Angeles County. Bleasdell filed his first amended complaint on or about March 11, 1994, alleging claims for (1) age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, (2) violation of public policy, (3) breach of contract, and (4) breach of the covenant of good faith and fair dealing. On March 29, 1994, the first amended complaint was removed to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1331 based on the federal question posed by Bleasdell's ADEA claim.

On October 31, 1994, NME filed its Motion for Summary Judgment. After allowing Bleasdell significant additional time for discovery, the district court granted the motion on August 28, 1995, and entered judgment dismissing Bleasdell's action in its entirety.

On September 11, 1997, a split panel of the Ninth Circuit reversed the grant of summary judgment on the ADEA claim.[2] On November 7, 1997, a split panel of the Ninth Circuit rejected NME's petition for rehearing and/or rehearing en banc. NME invokes the jurisdiction of this Court under 28 U.S.C. §§ 1254(1) and 2101(c).

REASONS FOR GRANTING THE PETITION

This case presents the frequently debated issue of what is the appropriate standard for a plaintiff to establish pretext and defeat an employer's motion for summary judgment in an employment discrimination case.[3] This

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[2] The summary judgment was affirmed as to the employment contract claims.

[3] This topic has been the subject of numerous articles, which have discussed the split in the Circuits and the need for Supreme Court review. See, e.g., Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. Davis L. Rev. 261 (1994); *Developments in the Law - Employment Discrimination, Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579 (1996); Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251 (1994); Julie Tang & Hon. Theodore M. McMillian, *Eighth Circuit Employment Discrimination Law: Hicks and its Impact on Summary Judgment*, 41 St. Louis U. L.J. 519 (1997); Tim D. Gray, Note, *Employment Discrimination: Summary Judgment and Rule 301 After St. Mary's Honor Center v. Hicks*, 15 Miss. C. L. Rev. 217 (1994); Richard T. Seymour, *Summary Judgment Motions After Hicks*, C874 ALI-ABA 167 (1993); Robert B. Fitzpatrick, *Burden of Proof in Post-Hicks Cases*, SC08 ALI-ABA 1483 (1997); Edward T. Ellis, *Employment* (continued...)

issue arises in the context of the *McDonnell Douglas* tripartite burden-shifting framework, which was devised by the Supreme Court as a means of dealing with employment discrimination cases where a plaintiff has only indirect evidence of discrimination. Under this framework, a discharged employee has the burden of showing a prima facie case of discrimination, at which point the burden shifts to the defendant employer to produce evidence of a legitimate, non-discriminatory business reason for the termination. Once a reason has been articulated, the burden is on the plaintiff to establish that the reason provided by the employer is merely a pretext for unlawful discrimination.

It is at this juncture that the Circuit Courts of Appeal have diverged: how does an employee establish pretext.[4] Several Circuits have adopted the "pretext-plus" approach, whereby an employee must show *both* that the reason for his termination was false *and* that discrimination was the real reason for his termination. Other Circuits have embraced the "pretext-only" approach, which allows a plaintiff to show *either* the falsity of the employer's reason

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[3](...continued)
Discrimination Litigation in the Federal Courts of Appeals After St. Mary's Honor Center v. Hicks, SC08 ALI-ABA 663 (1997).

[4] *See Developments in the Law - Employment Discrimination, Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1590 (1996) [hereinafter *Shifting Burdens*] ("The greatest development (and controversy) has been at the pretext stage: whether the plaintiff's exposure of the defendant's explanations as pretextual constitutes a finding of discrimination, or whether the plaintiff must show pretext 'plus' affirmative indicia of discriminatory animus.").

or that discrimination was the real reason. Additionally, some courts have gravitated towards a middle ground, the so-called "pretext-maybe" approach, which gives the court latitude to consider the facts of the case.

This issue of which standard to apply was seemingly resolved by the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), in which "pretext-plus" was definitively adopted as the proper approach. However, the Circuits that followed pretext-only before *Hicks*, including the Ninth Circuit here, have continued to do so by arguing that dictum in the *Hicks* opinion suggests that pretext alone could be sufficient.[5] Courts have also found a way around the Supreme Court's pronouncement by arguing that *Hicks* only addresses the burden at trial, not summary judgment. As a result, numerous post-*Hicks* decisions demonstrate that a serious conflict still exists among the various Circuits as to this issue of extreme national importance, and guidance from the Supreme Court is necessary.[6]

The Ninth Circuit is one of several Circuits that has ignored the Supreme Court's pronouncement in *Hicks*. In a split decision, the Panel below held that "Bleasdell presented sufficient evidence to create an inference that the reasons given by National Medical to justify its decision to terminate Bleasdell were pretextual." (App., *infra*, 8a.) In

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[5] *See Shifting Burdens, supra* note 4, at 1593.

[6] In addition to the inter-Circuit conflict, there is also considerable intra-Circuit division on this issue. See discussion, *infra*, for a breakdown of the various positions taken by the Circuit Courts of Appeal.

so holding, the Panel adopted the pretext-only approach: "in order to survive summary judgment, the plaintiff 'must produce enough evidence to allow a reasonable fact finder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one.'" (App., *infra*, 6a (citing *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996)) (emphasis in original).) Therefore, certiorari should be granted to address the Ninth Circuit's express rejection of the pretext-plus standard mandated by the Supreme Court, as well as the conflict among the various Circuits on this issue. This case is an ideal vehicle for a Supreme Court pronouncement on this issue because it demonstrates the utility of the *Hicks* pretext-plus standard, as well as the concurrent futility of pretext-only. Here, the evidence of pretext is so flimsy, that it would be absurd to allow the matter to go to trial absent some evidence of discriminatory animus (the so-called "plus" in pretext-plus). To hold otherwise would virtually eliminate the summary judgment motion as a judicial tool for preventing meritless actions from proceeding to trial. Without pretext-plus, there would be a rash of trials in employment discrimination cases where there is no evidence of discrimination.

Another issue presented by this case, which requires resolution by the Supreme Court, concerns the weight that should be accorded to the testimony of a supervisor who disagreed with the employer's decision to terminate the employee. Such testimony should not create a triable issue of fact, particularly where the supervisor himself was disciplined for failing to take proper action against the terminated employee. In finding a triable issue of fact under its pretext-only approach, the Ninth Circuit relied solely on the testimony of Bleasdell's former supervisor,

Metz, who did not dispute the occurrence of any of the aforementioned incidents; he merely opined that termination was not warranted for the infractions. Furthermore, Metz was demoted following his failure to discipline Bleasdell for the near-crashes and for lying to the CEO. The Ninth Circuit's decision conflicts with sound case law from the Seventh Circuit, which holds that a supervisor's disagreement with an employer's decision does not create a triable issue unless the supervisor refutes the specific facts in the case. The Ninth Circuit's finding of pretext here lowers the bar to a such a degree that every plaintiff in an employment discrimination case will be able to clear it and proceed to trial.

I. Review By The Supreme Court Is Necessary Because Of The Conflict Among The Circuits Following The Supreme Court's Decision In *St. Mary's Honor Ctr. v. Hicks.*

The important national question of whether "pretext plus" is, in fact, the proper standard to apply in employment discrimination cases was addressed by the Supreme Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). In analyzing the proper application of "pretext," the Supreme Court in *Hicks* stated unequivocally as follows: "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515, 113 S. Ct. at 2752 (emphasis in original).

However, despite the Supreme Court's express mandate, the Ninth Circuit here specifically rejected "pretext plus," following the Ninth Circuit's decision in *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996),

cert. denied, 118 S. Ct. 369 (1997). The *Nidds* court used the following rationale as justification for ignoring the *Hicks* edict:

> At trial, [plaintiff] must prove "*both* that the [employer's alleged] reason was false, *and* that discrimination was the real reason." [citing *Hicks*.] However, if [plaintiff] persuades the jury that the defendant's alleged reason is false, then "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case . . . will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." [citing *Hicks*.] Thus to survive summary judgment, [plaintiff] is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude--based on [plaintiff's] prima facie case *and* the factfinder's disbelief of [defendant's] reasons for discharge--that discrimination was the real reason for [plaintiff's] discharge.

Nidds, 113 F.3d at 918 n.2 (emphasis in original). The Ninth Circuit's use of the seemingly contradictory language from *Hicks* is unavailing because the Supreme Court anticipated and rejected the argument:

> [T]here is nothing whatever inconsistent between [these statements]. Even though

> . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

Hicks, 509 U.S. at 511 n.4, 113 S. Ct. at 2749 n.4 (emphasis in original). In other words, a court can still determine, as a matter of law, that there is insufficient factual support for a *finding of discrimination*, even where there is sufficient evidence that the employer's stated reasons were false. This reading of *Hicks* finds support in the decisions of several Circuit Courts of Appeal. However, other Circuits have gone the other way and relied on the arguably inconsistent *Hicks* dictum to cling to the disfavored pretext-only approach.[7] Obviously, the Ninth Circuit is not alone in its misapplication of *Hicks*. The Circuits break down as follows:

First Circuit (Pretext-plus)

> The First Circuit has held that
>
> In the context of a summary judgment proceeding, *Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before

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[7] "The circuits are split on the question of what evidence is sufficient to create a triable issue of intentional discrimination when the employer produces evidence of a legitimate business reason for the discharge." Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. Davis L. Rev. 261 (1994)

> becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age. **"Direct or indirect evidence of discriminatory motive may do, but 'the evidence as a whole . . . must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.'"**

LeBlanc v. Great American Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993) (emphasis added) (citations omitted), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1398 (1994); *see also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 262 (1st Cir. 1994) (holding that plaintiff must produce "sufficient evidence to raise a genuine issue of material fact such as would permit a reasonable factfinder to conclude that [the employer] did not rely on its articulated reasons . . . *and* that [the employer] unlawfully discriminated against [plaintiff] because of his age").

Third Circuit (Pretext-only)

The Third Circuit has interpreted the Supreme Court's decision as allowing the trier of fact to infer the ultimate fact of discrimination from its disbelief of the employer's reason for its actions. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 2532 (1997); *see also Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994).

Fourth Circuit (Pretext-plus and pretext-only)

The Fourth Circuit properly followed *Hicks* in *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), *cert. denied*, 116 S. Ct. 380 (1995), finding that a plaintiff must prove both that the defendant's articulated reason for its action was false and that discrimination was the real reason. However, the Fourth Circuit has also held that a genuine issue of fact about the defendant's proffered reason can defeat a summary judgment motion. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993).

Fifth Circuit (Pretext-plus)

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), the Fifth Circuit examined *Hicks* and concluded that

> a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer **and** (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. **The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.**

Id. at 994 (emphasis added); *See also Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

Seventh Circuit (Pretext-only)

The Seventh Circuit has seized upon the dicta in *Hicks* to find that summary judgment can be precluded by evidence that the employer's articulated reasons are false. *Perdomo v. Browner*, 67 F.3d 140 (7th Cir. 1995); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994).

Eighth Circuit (Pretext-plus, pretext-only, and pretext-maybe)

The Eighth Circuit is emblematic of the schizophrenic approach to this issue, with panels that have adopted pretext-plus, pretext-only, and pretext-maybe as the proper standard. In *Krenik v. County of LeSueur*, the court followed the *Hicks* decision and held as follows:

> To survive summary judgment at the third stage of the *McDonnell Douglas* analysis, a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext **and** that the real reason for its action was intentional discrimination.

Krenik, 47 F.3d 953, 958 (8th Cir. 1995) (emphasis added); *See also Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995); *Nelson v. Boatmen's Bancshares, Inc.* 26 F.3d 796, 801 (8th Cir. 1994).

However, In *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir.), *cert. denied*, 513 U.S. 946,

115 S. Ct. 355 (1994), the court espoused the pretext-only approach when it indicated that a plaintiff could prevail if the elements of a prima facie case are present and there is sufficient evidence to reject the employer's proffered reason. *See also Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994) (summary judgment can be overcome by producing evidence that would allow a reasonable jury to reject the defendant's proffered reasons).

The Eighth Circuit attempted to reconcile the pretext-plus and pretext-only cases in *Rothmeier v. Investment Advisers, Inc.*, by holding that

> an age discrimination plaintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. The second part of this test sometimes may be satisfied without additional evidence where the overall strength of the prima facie case and the evidence of pretext "suffice[s] to show intentional discrimination." The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age.

Rothmeier, 85 F.3d 1328, 1336-37 (8th Cir. 1996). In subscribing to this pretext-maybe approach, the *Rothmeier* court recognized that pretext-only had clearly been rejected by *Hicks*, and that summary judgment for the employer is still proper absent sufficient evidence to infer discrimination:

> We believe that *Hicks* allows a trial judge to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext. Intentional discrimination *vel non* is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not.

Id. at 1335.

Ninth Circuit (Pretext-only, pretext-plus)

Even the Ninth Circuit is not immune from conflict. While the *Nidds* case, discussed above, has clearly adopted pretext-only, another panel suggested that pretext plus was the proper standard. The Ninth Circuit's most recent published decision regarding a plaintiff's burden in overcoming summary judgment in an employment discrimination case came in *Tarin v. County of Los Angeles*, 123 F.3d 1259 (9th Cir. 1997). In *Tarin*, the plaintiff claimed she did not receive a promotion because she was discriminated against on the basis of race and military service, and the employer countered that she was not

promoted because she received a failing score on her Appraisal of Promotability. Applying the *McDonnell-Douglas* burden shifting analysis, the Court assumed arguendo that the prima facie case was established, but held that the plaintiff had failed to establish pretext: "she failed to show that the [employer's] reasons for not promoting her were based on race." *Id.* at 1264. The Court went on to state that it **accepted** that the plaintiff was discriminated against on the basis of military service, which means the employee succeeded in establishing the falsity of the employer's stated reason. However, falsity proved to be insufficient: "There is simply nothing in the record to suggest animus on account of race." As such, the Court affirmed the District Court's dismissal of all claims of racial discrimination. *Id.* The *Tarin* court has clearly suggested that **both** falsity **and** discriminatory animus are necessary to withstand summary judgment.

Tenth Circuit (Pretext-plus, pretext-only, and pretext-maybe)

The Tenth Circuit has also weighed in on the pretext-plus side in an unpublished decision. *Card v. Hercules, Inc.*, 1993 WL 351337, 1993 U.S. App. LEXIS 21631 (10th Cir. 1993) (affirming summary judgment in favor of employer and describing the *Hicks* holding as follows: "the plaintiff cannot simply prove that the employer's proffered reasons for its action are false, but must offer evidence that the action was actually the result of unlawful discrimination"); *see also E.E.O.C. v. Flasher Co.*, 986 F.2d 1312, 1319 (10th Cir. 1992).

However, in *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the court defined "pretextual" as meaning

"unworthy of belief," which clearly does not incorporate the necessary element of discriminatory motive.

To further muddy the Tenth Circuit waters, the court in *Durham v. Xerox Corp.*, 18 F.3d 836 (10th Cir.) *cert. denied*, 513 U.S. 819, 115 S. Ct. 80 (1994), appears to adopt the fact-sensitive pretext-maybe approach, holding that disproof of the employer's reasons does not prove discrimination, but may permit the fact finder to infer discrimination to defeat summary judgment.

Eleventh Circuit (Pretext only)

In a remarkable misreading of the sharply-divided opinion in *Hicks*, the Eleventh Circuit found that the Supreme Court was unanimous that disbelief of the defendant's proffered reasons will support a finding of discrimination and preclude summary judgment. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, ___ S. Ct. ___, 1998 WL 6337 (1998).

D.C. Circuit (Pretext-maybe)

The D.C. Circuit's decisions provide that the fact finder may, if persuaded, find discrimination based on a rejection of the employer's proffered reason. *Kolstad v. American Dental Assoc.*, 108 F.3d 1431 (D.C. Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted in part*, 116 S. Ct. 805, *and cert. dismissed*, 116 S. Ct. 1037 (1996). This is consistent with the pretext-maybe approach.

The above is a detailed but non-exhaustive sampling of the decisions from the various Circuits. The inclusion of

the pretext-maybe category obviously clouds the picture, but also highlights the divergence of opinion. As one authority suggests,

> The best way of reconceiving the pretext-only/pretext-plus spectrum after Hicks, without getting confused by pretext-maybe, is to rate the courts' receptiveness to Hicks's permissive passage. The Second, Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits have indicated receptiveness whereas the Fifth and Eighth have shown hostility. The First, Fourth, and Sixth Circuits also are hostile. The Tenth Circuit, however, seems friendly.[8]

The final tally, at least by this source's count, appears to be five Circuits that adhere to the pretext-plus approach, and seven Circuits that have failed to follow *Hicks* in varying degrees (from pretext-only to pretext-maybe). Even assuming arguendo that the *Hicks* opinion was equivocal as to whether pretext-plus or pretext-maybe was the proper standard, it is abundantly clear that pretext-only was flatly rejected.[9] Yet, for some reason, there are still Circuits that present pretext-only as a viable option, including the Ninth Circuit in this case. As such, this is obviously an issue that has fomented pointed disagreement among the Circuit

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[8] *Shifting Burdens*, 109 Harv. L. Rev. at 1593 n.89.

[9] *See, e.g.*, Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251, 1267 (1994).

Courts of Appeal, and it is necessary for the Supreme Court to resolve this conflict.

II. The Question Of Plaintiff's Burden In Establishing Pretext To Defeat Summary Judgment In An Employment Discrimination Case Is Of Exceptional Importance And Requires Uniform National Application.

Review by the Supreme Court is necessary because of the exceptional importance of the issue presented here: plaintiff's burden in establishing pretext to defeat summary judgment in an employment discrimination case. While *Hicks* appeared dispositive on this issue, there is, quite obviously, no national consensus regarding the proper standard to be applied. Employment discrimination is a burgeoning area of law, and both plaintiffs and defendants would benefit from a clarification of the burdens litigants face at the summary judgment stage. Therefore, Supreme Court analysis is clearly warranted.

III. The Ninth Circuit's Decision Conflicts With Other Circuit Court Case Law That Holds That A Supervisor's Disagreement With An Employer's Decision Does Not Create A Triable Issue Of Fact.

Even assuming arguendo that pretext-only is the proper standard, the Ninth Circuit's decision below was clearly erroneous and subject to Supreme Court review because Bleasdell could not even establish that NME's articulated reasons were false. As mentioned above, the Panel below relied exclusively on the declaration of Metz, Bleasdell's former supervisor, to find a triable issue of fact

as to whether NME's stated reasons for Bleasdell's termination were false. (App., *infra*, 8a-9a.) NME respectfully submits that the Panel's decision conflicts with sound case law that holds that a supervisor's disagreement with an employer's decision does not create a triable issue **unless the supervisor refutes the specific facts in the case**. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1460 (7th Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994); *Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 924 (7th Cir. 1988) (former supervisor's affidavit that plaintiff's performance was satisfactory and that her termination was the result of racial discrimination was insufficient to create a triable issue of fact as to whether the employer's performance-based explanation for termination was pretextual); *see generally Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989) (holding that conclusory allegations that are not backed up by statements of fact cannot defeat a motion for summary judgment).

In *Dey*, the plaintiff attempted to establish that her employer's articulated reasons for firing her were pretextual by introducing evidence that she was performing her duties adequately. *Dey*, 28 F.3d at 1460. However, the Seventh Circuit stated that such evidence is insufficient to create a triable issue of fact as to the employer's honest assessment of inadequate performance. The Court also noted that

> our cases also give little weight to statements by supervisors or co-workers that generally corroborate a plaintiff's own perception of satisfactory job performance. Such evidence . . . does not shed any light on whether the employer honestly based its

> employment decision on performance-related considerations, which is the focus of our inquiry in these cases.

Id. (citations omitted). The *Dey* court eventually found a triable issue, but only because the other evidence offered **refuted** the facts that allegedly supported the employer's claim of performance deficiencies. *Id.*

Based on the above, for Metz' declaration to carry any weight whatsoever, Metz would have to deny that the incidents supporting NME's honest assessment of inadequate performance ever took place. However, far from denying the incidents, Metz **admits** that the near-crashes occurred and that Bleasdell lied about one of them. He merely offers his opinion that the incidents should not have resulted in Bleasdell's termination. As such, Bleasdell has utterly failed to raise any triable issue as to the honesty of NME's reasons for terminating him. The inquiry here is not whether Metz **thinks** Bleasdell was a competent pilot - the only question is whether Metz is able to **refute** NME's reasons for firing Bleasdell. As the Seventh Circuit has repeatedly noted, "general averments of adequate performance are insufficient to create a factual issue on summary judgment." *Id.*

The facts in *Anderson* are remarkably on point. There, the employer advanced four incidents as evidence of inadequate performance that led to the plaintiff's termination. *Anderson*, 13 F.3d at 1124. The plaintiff argued that these incidents were merely a pretext for age discrimination, and introduced the declaration of his supervisor as evidence of adequate performance. *Id.* Like Metz, the supervisor did not dispute that the incidents did,

in fact, occur. *Id.* The supervisor merely stated, as Metz did, that he did not believe the plaintiff was fired for performance inadequacies. *Id.* at 1124-25. The Seventh Circuit flatly rejected this evidence, finding that it was insufficient to create a genuine issue of fact: "[the plaintiff] has failed to show that [the employer] lied by claiming that he was fired for performance reasons." *Id.* at 1125.

Similarly, Bleasdell has failed to raise a triable issue of fact here: Metz did not dispute that the incidents occurred; he merely stated that he does not think Bleasdell was fired for these performance inadequacies. Therefore, NME is entitled to judgment as a matter of law, and the Ninth Circuit should have affirmed the district court's decision. The Ninth Circuit's decision is clearly erroneous, and it conflicts with other Circuit Court case law in this regard. As such, Supreme Court review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 11, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 11 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID K. BLEASDELL,
Plaintiff-Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant-Appellee.

No. 95-56470
D.C. No. CV 94-01989-LGB

Appendix A

MEMORANDUM*

Appeal for the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted March 5, 1997
Pasadena, California

Before: SCHROEDER, FERGUSON, and LEAVY, Circuit Judges

David K. Bleasdell appeals the district court's grant of summary judgment for National Medical Enterprises, Inc. Bleasdell alleges that National Medical violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and breached its implied-in-fact employment contract with Bleasdell. Because the district court erred in evaluating National Medical's motion for summary judgment with respect to age discrimination, we reverse. We affirm on the employment contract claim.

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* This disposition is no appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.

Appendix A

I. THE EMPLOYMENT DISCRIMINATION CLAIM

Bleasdell was hired as a pilot and mechanic for National Medical in 1980. Six years later, he was promoted to the position of pilot-in-command/captain pilot. After eleven years with National Medical, Bleasdell was terminated involuntarily. At the time of his termination, he was 52 years old -- the oldest pilot in the Department.

National Medical claims that Bleasdell was terminated for dishonesty and inadequate piloting skills. Walter Kraujalis, Manager of the Aviation Department at the time Bleasdell was terminated, submitted declarations in support of National Medical's motion for summary judgment.

Specifically, Kraujalis referred to two incidents, which relate to Bleasdell's piloting skills and his report of those events. The first occurred in July of 1990, when Bleasdell was pilot-in-command on a flight which landed in Gainsville, Georgia. Bleasdell's co-pilot, Andy Higgins, was the actual pilot. On its final approach, Bleasdell noticed that the aircraft was experiencing a high sink rate which requires an increase in power to avoid a hard landing. He explained this to Higgins. However, Higgins failed to respond and temporarily lost control of the plane. Bleasdell took control and landed it safely. The plane bounced on the runway several times.

The second incident occurred in April of 1991. Bleasdell was captain on a flight to Lexington, Kentucky. Bleasdell was piloting a newly acquired aircraft, the Gulfstream III. Walter Kraujalis served as his co-pilot and instructor. The plane bounced upon landing and Bleasdell piloted the plane back into the air and executed another approach and landing.

Bleasdell contended that these incidents were not truly the basis for his termination but were mere pretexts. He submitted a declaration from Robert Metz, his supervisor at National Medical during the time these incidents occurred, as support. Metz recalled these incidents and questioned whether they were significant enough to warrant Bleasdell's dismissal.

In particular, Metz questioned how Kraujalis' evaluation of the events which transpired during the Gainsville flight could have been accurate, especially given that the event occurred several years before Kraujalis was employed by National Medical and was based only on a review of written accounts by Metz and Bleasdell. Metz declared that Kraujalis' evaluation was without a plausible basis for inferring that Bleasdell's actions were below standard. Metz also considered the Lexington landing. He stated that after fully evaluating the situation, including interviewing both Bleasdell and Kraujalis, he concluded that Bleasdell's actions may have been prudent under the circumstances.

Appendix A

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment on the age discrimination claim de novo. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1997). In the context of defending against a summary judgment motion, a plaintiff alleging employment discrimination has the burden of "producing enough evidence to permit the trier of fact to infer the fact at issue." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n. 7 (1981).

III. MCDONNELL DOUGLAS' SHIFTING BURDENS OF PROOF

We apply the burden-shifting method established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to evaluate claims of age discrimination in employment by plaintiffs who do not have direct evidence of their employer's discriminatory intentions. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420 (9th Cir. 1990).

The application of the McDonnell Douglas method to age discrimination cases requires a plaintiff to first establish a prima facie case. The elements of a prima facie case are that the plaintiff:

(1) was a member of the protected class (age 40 to 70);

(2) was performing his job in a satisfactory manner;
(3) was discharged; and
(4) was replaced by a younger employee.

Messick v. Horizon Indus., Inc., 62 F.3d 1227, 1229 (9th Cir. 1995). The burden of establishing a prima facie case is not designed to be "onerous." Burdine, 450 U.S. at 253. It only requires the production of evidence which suggests that the employment decision was based on age. Diaz v. American Tel. & Tel., 752 F.2d 1356, 1361 (9th Cir. 1985). Upon establishing a prima facie case, a presumption of unlawful discrimination arises. Burdine, 450 U.S. at 254.

After the plaintiff has established a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Once the defendant has satisfied its burden, the presumption of unlawful discrimination vanishes. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

At this point, in order to survive summary judgment, the plaintiff "must produce enough evidence to allow a reasonable fact finder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." Nidds, 113 F.3d at 918. As explained in Nidds, to survive a summary judgment motion, a plaintiff need not provide direct evidence of discriminatory intent as long as a

reasonable fact finder could conclude -- based on the plaintiff's prima facie case and the fact finder's disbelief of the defendant's reasons for discharge -- that discrimination was the real reason for the discharge. Id. at 918 n. 2.

IV. APPLICATION

The district court held that Bleasdell failed to provide sufficient facts to establish a prima facie case of age discrimination. Specifically, the court held that Bleasdell failed to prove he was performing his job satisfactorily. We disagree.

Bleasdell introduced his two most recent performance evaluations and the declaration from Robert Metz, his former supervisor. These documents provide sufficient evidence that Bleasdell performed his job satisfactorily. See Messick, 62 F.3d at 1229 (stating the requisite degree of proof to establish satisfactory performance element of prima facie case is minimal).

The district court's alternative basis for granting summary judgment in favor of National Medical on Bleasdell's ADEA claim was also in error. The district court held that Bleasdell failed to satisfy his ultimate burden because he failed to show that National Medical's stated reasons for terminating him were false and that the real reason for his termination was discrimination.

The district court erred by adopting an overly stringent test for evaluating whether or not Bleasdell had

provided sufficient evidence to withstand summary judgment. This court has rejected the application of what has been dubbed "pretext plus" to the evaluation of motions for summary judgment. See e.g. Nidds, 113 F.3d at 918 n. 2. Rather, we have held that "[a]lthough the mere existence of a prima facie case, based on the minimum evidence necessary to raise a McDonnell Douglas presumption, does not preclude summary judgment, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext." Warren, 58 F.3d at 442 (internal citations omitted); see also Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

Bleasdell presented sufficient evidence to create an inference that the reasons given by National Medical to justify its decision to terminate Bleasdell were pretextual. In particular, while the declaration from Metz acknowledges that the landing incidents cited occurred, it disputes that they were truly the basis for Bleasdell's termination.

A former supervisor who is personally aware of the facts cited by an employer to justify its decision to terminate a plaintiff can offer important insight into whether the reasons offered by the defendant were pretextual. Very rarely can a plaintiff find direct evidence of intent. This is especially true when defending against an employer's motion for summary judgment. Metz's declaration creates a triable issue of fact as to whether the stated reasons for Bleasdell's termination were false. That is a decision which must be left to a finder of fact.

Appendix A

V. BREACH OF CONTRACT OF CLAIM

Bleasdell also claims that National Medical breached its employment contract by terminating him without cause. We reject this argument.

Under California law, employment with no specified term may be terminated at the will of either party at any time. See Cal. Lab. Code § 2922. This presumption of at-will employment may, however, be rebutted by evidence of an implied agreement limiting the employer's right to discharge the employee. See Foley v. Interactive Data Corp., 765 P.2d 373, 376 (Cal. 1988). National Medical claims that Bleasdell was an at-will employee, as evidenced by his having signed written acknowledgments to that effect on three separate occasions in 1983, 1988, and 1990.

National Medical claims that these acknowledgments were intended by the parties as final expressions of their agreement and therefore cannot be contradicted by parole evidence. Bleasdell concedes that he signed the at-will acknowledgments, but argues that they are not binding, integrated contracts because the acknowledgments are contained in an employee handbook which states that the handbook is not intended to create a contract for employment and that the handbook may be modified or amended by National Medical.

Bleasdell's arguments are without merit. An agreement may be integrated with respect to one or more, but less than all, of its provisions. Comeaux v. Brown &

Williamson Tobacco Co., 915 F.2d 1264, 1271 n. 7 (9th Cir. 1990). The 1990 acknowledgment signed by Bleasdell included an integration clause with respect to the length and termination of employment. We agree with the conclusion of the district court that the signed acknowledgments were intended to be a final expression of the parties' agreement on the term of employment. Bleasdell cannot introduce extrinsic evidence of an alleged implied contract to terminate only for cause. See id. Bleasdell has failed to present a genuine issue of material fact for breach of an implied contract to terminate only for cause.

VI. CONCLUSION

We reverse the grant of summary judgment on the ADEA claim and affirm on the employment contract claim. The ADEA claim is remanded for trial.

Appendix A

Bleasdell v. National Med. Enters., Inc., No. 95-56470
LEAVY, Circuit Judge, dissenting, in part:

I dissent from that portion of the disposition which reverses the judgment on the ADEA claim.

I agree with the majority that Bleasdell established a prima facie case by providing sufficient evidence that he was performing his job satisfactorily. See Messick, 62 F.3d at 1229. I disagree with the majority's conclusion that the affidavit from Bleasdell's former supervisor, Metz, provides sufficient evidence to allow a trier of fact to infer that National Medical's reasons for termination were pretextual.

National Medical offered evidence that Bleasdell was terminated for dishonesty and inadequate piloting skills. During the Lexington landing incident, Bleasdell, the pilot-in-command, hit the ground hard, aborted the landing, and made a second attempt to land. National Medical's chief executive officer, Mr. Eamer, was a passenger on this flight. When Bleasdell aborted the landing, Eamer shouted to the cockpit, demanding to know what had happened. Bleasdell directed his flight mechanic to lie by telling Eamer that something blew across the runway.

Metz's affidavit does not create a triable issue with respect to any of these assertions of fact. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124-25 (7th Cir. 1994) (a supervisor's disagreement with the employer's termination decision creates a triable issue only when the supervisor specifically refutes the facts that allegedly

support the employer's claim of performance deficiencies). Metz does not say that the troublesome landings did not occur, nor does he say that Bleasdell did not lie to Eamer. Neither Metz nor anyone else say that these events were trivial. Instead, Metz simply gives his own assessment of these undisputed events to minimize their importance. Simply questioning management's judgment created no triable issue of fact. See Anderson, 13 F.3d at 1124-25.

Moreover, at the time of his affidavit, Metz was not Bleasdell's supervisor. The record shows that Metz was demoted as supervisor because the employer was dissatisfied with Metz's handling and supervision of Bleasdell regarding the landings at issue. A former supervisor's general opinions regarding past job performance are insufficient to contradict the employer's current business decision which weighs performance-based considerations. Williams v. Williams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988).

The ADEA is not a general regulation of the workplace, but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of discharging their employees. See McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 361 (1995). This court should not be concerned with whether National Medical's decision was wise, accurate, ill-informed, or ill-advised. The pretext inquiry focuses on the honesty, not the accuracy or wisdom, of the reasons for termination. See Helland v. South Bend Community Sch. Corp., 93 F.3d

327, 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 769 (Jan. 21, 1997).

National Medical was assessing the performance of a pilot charged with the safe transportation of employees and clients. Bleasdell has failed to produce specific evidence which would create an inference of age discrimination. I would affirm the grant of summary judgment.

Appendix B

APPENDIX B - JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED AUGUST 29, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 29 1995
Clerk, U.S. District Court
Central District of California

DAVID K. BLEASDELL,
Plaintiff,

v.

NATIONAL MEDICAL ENTERPRISES,
Defendant.

CV 94-1989 LGB (SHx)

JUDGMENT

The Court hereby ORDERS, ADJUDGES, and DECREES that judgment be and hereby is entered in favor of defendant, NATIONAL MEDICAL ENTERPRISES, and against plaintiff DAVID K. BLEASDELL, on plaintiff's first amended complaint, and that plaintiff take nothing of defendant by way of that complaint.

Appendix B

SO ORDERED.

Dated: August 28, 1995

/s/
LOURDES G. BAIRD
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 29 1995
Clerk, U.S. District Court
Central District of California

DAVID K. BLEASDELL,
Plaintiff,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant.

CV 94-1989 LGB (SHx)

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

Defendant National Medical Enterprises, Inc. has moved this Court for summary judgment on all claims asserted in plaintiff's first amended complaint. Having reviewed all pertinent papers on file herein, including the supplemental material submitted by plaintiff, and having considered the argument of counsel, the Court, for the reasons set forth below, ORDERS that defendant's motion for summary

judgment is hereby GRANTED and that judgment be ENTERED accordingly.

II. FACTUAL BACKGROUND

The following facts, and any others so indicated below, appear to be undisputed. Plaintiff David Bleasdell was employed by defendant National Medical Enterprises, Inc. (NME) as a pilot and mechanic in NME's aviation department. (Bleasdell Dep. at 54-75.) Plaintiff was hired in August 1980, and was not hired for any specified term. (Id.)

On October 14, 1983, Bleasdell signed an "Acknowledgment," which states in part that "[u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is governed by section 2922 of the Labor Code. Continuation of employment is always at the company's sole discretion." (Id., Ex. 6.) On March 12, 1988, Bleasdell signed another "Acknowledgment," which states that

> [u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is at the mutual consent of the employee and the company. Accordingly, either the employee or the company can terminate the employment relationship at will, with or without cause, at any time.

(Id., Ex. 7.) On April 11, 1990, plaintiff signed a further "Acknowledgment," which states that

> [u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is at the mutual consent of the employee and the company. Accordingly, either the employee or the company can terminate the employment relationship at will, with or without cause, and with or without notice, at any time, and this decision shall constitute the entire agreement between the company and its employees with respect to the length of employment, and both the termination of employment and the manner in which employment may be terminated.

(Id., Ex. 8.)

At some point during the term of plaintiff's employment with NME, he became a "pilot-in-command," and was thus given the authority to determine whether flights could be safely completed or should be diverted for safety considerations. (Kraujalis Decl., Ex. A; Bleasdell Dep. at 161-65.) The position of pilot-in-command is both an important and sensitive one. (Id. at 161.) on July 5, 1990, plaintiff was pilot-in-command on a Falcon 10 aircraft that landed in Gainsville, Georgia. (Id. at 271-73; Ex. 16.) Plaintiff was accompanied by NME employee Andy Higgins, who was in the left seat of the aircraft and was responsible for flying the plane. (Id. at 273, Ex. 16.) In addition to acting as pilot-in-command, plaintiff was

responsible for co-piloting the aircraft, operating the radio, assisting with navigation, and overseeing Higgins's performance. (Id. at 273.) On the final approach, at approximately thirty feet above the runway, plaintiff noticed that the aircraft was experiencing a high sink rate (a "sinker" in the vernacular), which ordinarily necessitates an increase in power to avoid a hard landing. (Id. at 271-85; Ex. 16.) Plaintiff verbally called out to Higgins that the aircraft was experiencing a sinker. (Id. at 271-85; Ex. 16.) Higgins failed to properly respond and temporarily lost control of the aircraft, which resulted in a "hard landing" and the plane bouncing off of the runway from two to four times. (Id. at 271-85; Ex. 16.) Plaintiff grabbed the controls after approximately the second bounce. (Id. at 271-85; Ex. 16.) It is possible that plaintiff could have taken the controls from Higgins sooner than he did. (Metz Decl. ¶ 24.) Plaintiff reported this incident (the so-called Gainsville incident) to Robert Metz, Aviation Manager, primarily because the passengers on the aircraft were shaken by the landing. (Bleasdell Dep. at 271-85; Ex. 16.)

In April 1991, plaintiff was captain on a leg of a flight between Bangor, Maine and Lexington, Kentucky. (Id. at 291.) Plaintiff made the approach into Lexington, but "bounced" the airplane once on landing. (Id. at 294.). By plaintiff's description, "[i]t was an easy bounce, but it came back up, I felt, rather high." (Id. at 294-95.) After the bounce, plaintiff felt that insufficient runway remained, so he elected to execute a "go-around" or "touch-and-go"; that is, plaintiff piloted the plane back up into the air and executed another approach and landing. (Id. at 295-96.)

Appendix B

Richard Eamer, apparently NME's chairman of the board and chief executive officer, was aboard the airplane and, after the plane bounced, called out "Will somebody please tell me what's going on." (Id. at 291-96.) Plaintiff then instructed flight mechanic Fenton Hutchinson to inform Eamer that "something blew across the runway." (Id.) Hutchinson complied with plaintiff's instructions. (Id.) Thereafter, plaintiff had a conversation with Walter Kraujalis, another NME pilot, wherein plaintiff stated that "I should not have lied to Mr. Eamer. And I'll take care of it [later]." (Id. at 298.) Later, Metz apparently told plaintiff not to worry about explaining this lie to Eamer. (Id. at 301.) When plaintiff subsequently learned that Eamer was upset about the falsehood, plaintiff offered his apology. (Id. at 303.) The events described in this paragraph are referred to by the parties as the "Lexington incident."

In September 1991, plaintiff was to meet Eamer at 8:30 a.m. for a 10:00 a.m. flight to Flint, Michigan. (Id. at 304-05.) Plaintiff arrived at the airport sometime after 8:45 a.m. (Id. at 304-07.) Eamer, who is partially deaf, may have misheard plaintiff's explanation of his tardiness and thus assumed that plaintiff was lying again. (Id. at 307-09; Metz Decl. ¶ 33.) Plaintiff may have subsequently told Metz that Eamer was annoyed by plaintiff's tardiness. (Bleasdell Dep. at 308.) The events described in this paragraph are referred to by the parties as the "San Diego incident."

In late 1991, Kraujalis was promoted to manager of the Aviation Department and Metz was accordingly demoted. (Kraujalis Decl. ¶ 7.) Eamer expressed to Kraujalis his

displeasure at Metz for failing to report both the Lexington incident, (Kraujalis Supp. Decl. ¶ 3), and plaintiff's role in the Gainsville incident, (Kraujalis Decl. ¶ 7). After his promotion, Kraujalis evaluated the Aviation Department personnel and concluded that plaintiff and three other employees were not performing at a level consistent with department standards. (Id. ¶ 11.) Thereafter, plaintiff, Alex Valero (maintenance assistant), Andrew Higgins (co-pilot), and Cynthia Thompson (flight attendant) were terminated. (Id. ¶¶ 11-12.) Plaintiff received notice of his termination on January 17, 1992. (Bleasdell Dep. at 115.) Kraujalis has stated that "Plaintiff's poor landing and dishonesty to Mr. Eamer during the Lexington incident coupled with his failure to act during the Gainsville incident caused me to lose confidence in Plaintiff's ability to perform his duties at the high level required of a corporate pilot." (Kraujalis Decl. ¶ 10.)

III. PROCEDURAL HISTORY

Plaintiff's first amended complaint, filed in state court on March 11, 1994, was removed to the district court on the basis of the federal question posed by plaintiff's claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq. Plaintiff names NME as the sole defendant and alleges causes of action for (1) wrongful termination in violation of public policy; (2) violation of the ADEA; (3) breach of contract; and (4) breach of the covenant of good faith and fair dealing.

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Following the filing of defendant's present motion for summary judgment, the Court allowed plaintiff significant additional time for discovery, pursuant to Federal Rule of Civil Procedure 56(f). The Court also allowed plaintiff to submit further briefs and evidence at, and following, oral argument on defendant's motion. As plaintiff has thus been afforded a full opportunity to discover, to present evidence, and to brief the matters at issue, defendant's motion is ripe for consideration.

IV. ANALYSIS

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be entered against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish an element essential to that party's case, and on which that party would bear the burden of proof at trial. Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. Id. at 323.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. Id. at 324. A factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn

in the non-movant's favor. Id. at 255. If the non-moving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. Id. at 249-50.

B. DISCUSSION

Defendant moves for summary judgment on each claim stated in plaintiff's amended complaint.

1. BREACH OF CONTRACT CLAIMS

In his contract-based claims (breach of contract and breach of the implied covenant of good faith and fair dealing), which are discussed collectively below, plaintiff claims that NME breached plaintiff's employment contract by terminating him without cause.

The California Labor Code provides that "employment, having no specified term, may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922 (West 1989). This presumption of at-will employment may, however, "be superseded by a contract, express or implied, limiting the employer's right to discharge the employee." Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665 (1988). For example, a claimant may attempt to show, through the employee's long service and exemplary performance, that the employer, by giving oral assurances of job security, impliedly agreed not to terminate the employee except for good cause. See id. at 675-82 (discussing, inter alia, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311 (1981)).

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The presumption of at-will employment may not, however, be rebutted by evidence of an implied-in-fact contract that is contrary to a preexisting valid and express agreement. Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 211-12 (1993). Thus, in Rochlis, the plaintiff was prevented from introducing evidence of an implied contract that he would not be terminated except for good cause when his employment agreement expressly stated that the employer reserved the right of-termination "at any time for any reason whatever." Id. (citing Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467 (1984)).

Defendant moves for summary judgment on plaintiff's breach of contract claim, arguing that the presumption of at-will employment is conclusive here. If that were so, NME could, of course, terminate plaintiff's employment at will without breaching any contract. Defendant points to the uncontroverted facts that plaintiff was hired for an unspecified term, (Bleasdell Dep. at 56-57, 77, 87-90), and to the three at-will agreements signed by plaintiff, see supra. Defendant then contends that any implied contract to terminate plaintiff for good cause would be contrary to the express employment agreements and thus run afoul of the rule of Rochlis.

In opposition, plaintiff argues that the employment agreements quoted above were not integrated contracts and thus did not set forth all of the terms of plaintiff's employment. In support of this theory, plaintiff looks to language in the employee handbook that states "I understand that this handbook and its contents are not intended to

create a contract of employment" and that the handbook may be modified or amended. (Bleasdell Decl., Exs. G-J.) Plaintiff thus contends that he should be allowed to introduce evidence of the existence of an implied-in-fact agreement. Defendant rejoins that plaintiff has failed to realize that the Rochlis rule applies to the employment-status provision since that provision, even if not the entire employment agreement, is fully integrated.

In order to conclude that a document is integrated, the Court must "'determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein.'"[1] Slivinsky v. Watkins-Johnson Co., 221 Cal. App. 3d 799, 805 (1990) (quoting Cal. Civ. Proc. Code § 1856(d)). Significantly, an agreement may be integrated with respect to one or more, but less than all, of its provisions. Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271 n.7 (9th Cir. 1990) (applying California law). Thus, "[w]hen only one part of the agreement is integrated, the [parol evidence] rule applies to that part." Slivinsky, 221 Cal. App. 3d at 805 (internal quotation marks omitted) (alteration in original).

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[1] Under the parol evidence rule, extrinsic evidence of the subject matter expressed in an integrated writing is admissible only "to prove a meaning to which the language of the instrument is reasonably susceptible." Slivinsky, 221 Cal. App. 3d at 805 (internal quotation marks omitted).

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In examining the agreements to which plaintiff is signatory, quoted in full above, it certainly appears that they were intended to be a final expression of the parties agreement on the term of employment status. To wit, the 1983 agreement states that "[u]nless otherwise specified in a written contract . . ., all employment has no specified term and is governed by section 2922 of the Labor Code." (Bleasdell Dep., Ex. 6.) The other agreements contain substantially similar, if not identical, language. (See id., Exs. 7-8.) This conclusion is bolstered by the express merger clause contained in the 1990 Acknowledgement. (See id., Ex. 8.)

As the employment agreements in issue were completely integrated[2] with respect to plaintiff's employment status, plaintiff must not be allowed to introduce extrinsic evidence of an alleged implied-in-fact contract to terminate only for

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[2] Even if the provision in issue was not completely integrated, "there can be no implied contractual term completely at variance with an express term of the contract." Wagner v. Glendale Adventist Medical Ctr., 216 Cal. App. 3d 1379, 1383 (1989). The Wagner plaintiff was thus prevented from introducing evidence of an implied contract that contradicted the termination provision in the employee handbook which provided that termination was "at will." Id. at 1385-94.

A similar result would obtain here: Even if the employment-status provision was not fully integrated, plaintiff would be barred from introducing evidence of an implied contract since such evidence would be completely at variance with the contractual term stating that employment was at will.

good cause. Since defendant, in the absence of such a provision, would be free to terminate plaintiff at will, plaintiff's claim for breach of contract appears to fail as a matter of law.

In an attempt to avert this unfavorable result, plaintiff offers two additional arguments, each of which is easily disposed of. He first contends that the language of the agreements does not expressly "require" at-will employment. This contention is not supported by the express language of the agreements nor the express language of California Labor Code section 2922. Further, plaintiff's contention appears to be subsumed by the discussion immediately above (that is, proof of anything other than an at-will agreement would require introduction of contradictory evidence).

Second, although not entirely clear from his brief, it appears that plaintiff by his declaration suggests that he was coerced into signing the employment agreements quoted above.[3] (See Bleasdell Decl. ¶¶ 16-18.) Plaintiff has, however, previously testified in deposition that he did not recall either signing the documents or being pressured to sign the documents. (Bleasdell Dep. at 221-22.) He further testified that if "major" pressure were applied, he would have remembered. (Id.) As plaintiff's subsequent declaration, to the extent it is an attempt to argue that the

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[3] The Court has given plaintiff's declaration a liberal reading; that is, plaintiff states only that he "had to" and "was required to" sign the employment agreements.

employment agreement is invalid based on coercion, contradicts his previous sworn deposition testimony, the declaration must be rejected as a sham and found not to create a triable issue of fact. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991) (holding that sham affidavit subsequent to deposition testimony may not be used to create triable issue of fact); Radobenko v. Automated Equip. Corp., 520 F.2d 540, 544 (9th Cir. 1975) (holding that subsequent affidavit contradicting prior sworn testimony does not create genuine issue of fact); McCray v. Casual Corner, Inc., 812 F. Supp. 1046, 1048 (C.D. Cal. 1992) (same).

Based on the foregoing, plaintiff's claim for breach of an implied-in-fact contract fails as a matter of law and defendant's motion for summary judgment thereon must be GRANTED.

Lastly, assuming arguendo that plaintiff could prove that defendant was bound to discharge plaintiff only for good cause, it appears that good cause existed as a matter of law. That is, under California law an employer is permitted to subjectively evaluate the performance of employees who hold sensitive managerial or confidential positions. Pugh, 116 Cal. App. 3d at 330; see also Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1140 (1983). Here, it is uncontested that plaintiff held a confidential and sensitive position. (Bleasdell Dep. at 161-62.) Further, although the import of the Gainsville, Lexington, and San Diego incidents is in dispute, it is uncontroverted that those events did in fact occur. Thus, under the subjective standard

applicable here, defendant would have good cause to terminate plaintiff since CEO Eamer, correctly or incorrectly, was concerned with plaintiff's flying abilities and trustworthiness.

Based on the foregoing, and assuming that defendant was bound to terminate plaintiff only for good cause, defendant's motion for summary judgment on plaintiff's claim for breach of contract must be GRANTED on this alternative ground.

As plaintiff's claim for breach of the covenant of good faith and fair dealing is also contractual in nature, see Foley, 47 Cal. 3d at 693 (holding that absent special relationship, which is not present in employer-employee context, claim for breach of covenant of good faith is merely contractual), it too must fail for the reasons set forth above. Thus, defendant's motion for summary judgment on this claim is also hereby GRANTED.

2. VIOLATION OF PUBLIC POLICY CLAIM

In this claim, plaintiff contends that his termination based on age constitutes a tortious violation of the public policy concerns embodied in the ADEA, in the California Constitution, and in California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12920 et seq. Defendant moves for summary judgment on this claim on the basis of the statute of limitations.

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"The applicable statute of limitations for [a claim for discharge in violation of public policy] is one year." Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988) (citing Cal. Civ. Proc. Code § 340; Miller v. Indasco, 186 Cal. App. 3d 1336, 1339 (1986)). The statute of limitations begins to run on this tort claim at termination. See id.

As plaintiff's complaint, which was filed on January 14, 1994, tolled the statute almost two years after his termination date of January 17, 1992, this claim appears time barred.

In opposition, plaintiff contends that Funk was wrongly decided based on the Ninth Circuit's reliance upon the Miller case, which was subsequently vacated by the California Supreme Court. Plaintiff further contends that his protected interest here is a property, as opposed to a personal, right and that California's two-year statute of limitations should therefore apply.

Plaintiff's contentions are without merit. First, rightly or wrongly decided, Funk remains binding precedent in this circuit. Second, Funk does not appear to be wrongly decided since it appears that the interest at stake in a discrimination case is personal in nature.

Based on the foregoing, defendant's motion for summary judgment on this claim is hereby GRANTED.

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3. AGE DISCRIMINATION CLAIM

Lastly, plaintiff contends that the termination decision was improperly based on consideration of his age and was thus in violation of the ADEA.

a. PRIMA FACIE CASE

Absent direct evidence, plaintiff may establish a prima facie case for age discrimination by proving: (1) that he was between the ages of 40 and 70; (2) that he was performing his job in a satisfactory manner; (3) that he was discharged; and (4) that he was replaced by a "substantially younger employee with equal or inferior qualifications." Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990). Summary judgment is appropriate when plaintiff fails to produce sufficient facts in support of his prima facie claim. Stallcop v. Kaiser Found. Hosps., 820 F. 2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987). Defendant contends that plaintiff lacks evidence to support the second and fourth elements of his prima facie case.

(i) SATISFACTORY PERFORMANCE

Defendant contends that, in light of the Gainsville, Lexington, and San Diego incidents described above, plaintiff cannot establish that he was performing his job in a satisfactory manner.

In opposition, plaintiff contends that the following facts, which are discussed below, demonstrate triable issues on

whether his performance was satisfactory: the declaration of Robert Metz, plaintiff's two most recent performance evaluations, a general lack of criticism of plaintiff's performance, and NME's different treatment of younger pilots.

In sum, Metz, who has thirty years of experience as a pilot, contends that the incidents cited by NME do not constitute "firing offenses."[4] Plaintiff then relies on Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1460 (7th Cir. 1994), to support his proposition that, by refuting defendant's proffered firing offenses, plaintiff has demonstrated a genuine issue of fact.

Defendant offers a closer, and ultimately more persuasive, reading and analysis of Dey.[5] In Dey the Seventh Circuit noted that "general averments of adequate

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[4] Metz, for example, states: that the two suspect landings do not demonstrate that plaintiff was not performing satisfactorily, (Metz Decl. ¶¶ 20, 24); that it was unreasonable for Kraujalis to criticize plaintiff for the Lexington incident since Kraujalis was a training instructor on that flight; (id. ¶¶ 17, 19); that Kraujalis had a duty to report any piloting problems with plaintiff and provide correctional instruction; (id. ¶¶ 18-19, 21); and that Metz found plaintiff to have acted correctly in the Gainsville incident, (id. ¶¶ 23-29).

[5] Although the Dey court was specifically discussing the effect of a co-worker's statements in the pretext, as opposed to prima facie, phase of discrimination analysis, the parties apparently agree that it is equally applicable in the present discussion of plaintiff's prima facie case.

performance are insufficient to create a factual issue on summary judgment even when corroborated by statements of supervisors or co-workers." Id. The court continued, however, by stating that "a plaintiff may create an issue of fact by specifically refuting facts that allegedly support the employer's claim for performance deficiencies." Id. (emphasis added). Here, as defendant correctly notes, the evidence proffered by plaintiff supports, not refutes, the facts relied on by defendant in support of its claim of inadequate performance. That is, the Metz declaration confirms that the suspect landings did in fact occur, (e.g., Metz Decl. ¶¶ 14-15, 23), that plaintiff lied to Eamer about the Lexington landing, (id. ¶ 14), and that Eamer believed that plaintiff lied again at the San Diego airport, (id. ¶ 33).

That Metz offers a different opinion on the meaning of these uncontroverted facts is insufficient to demonstrate the existence of triable factual issues. Similarly, in Anderson v. Baxter Health Care Corp., 13 F.3d 1120, 1125 (7th Cir. 1994), the court wrote that "the mere submission of materials from a co-worker or a supervisor indicating that an employee's performance is satisfactory, or more specifically that an employee's performance is satisfactory because he was not entirely responsible for several admitted mishaps, does not create a material issue of fact." See also Williams v. Williams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988) (former supervisor's affidavit stating that plaintiff performed satisfactorily did not create genuine issue of fact).

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Plaintiff also contends that prior lack of criticism and good performance reviews evince his satisfactory performance. Again, assuming the truth of plaintiff's assertions, they still do not refute the occurrence of the incidents that allegedly troubled Eamer. Additionally, it is noteworthy that Metz, who was plaintiff's supervisor at the time of the incidents, was demoted in part for his failure to report plaintiff's falsehood regarding the Lexington incident. (Kraujalis Decl. ¶ 7.) It would thus appear that a lack of criticism of plaintiff was not due to his good performance but rather to Metz's failure to perform his duties. Metz's opinion and lack of criticism of plaintiff's performance is then at odds with the facts and, in any event, insufficient to avert summary judgment.

In his last argument of any significance, plaintiff suggests that younger pilots were treated differently for their "performance problems." Assuming that the disciplinary memoranda offered by plaintiff, (Darrow Decl., Ex. B), were directed to younger pilots, they fall far short of establishing any "differential treatment." It is, for example, unclear whether the incidents described in these memoranda were more or less serious than those involving plaintiff and whether any of those incidents involved attendant falsehoods. In any event, this evidence does not controvert defendant's evidence regarding the imperfect landings and falsehoods.

In his supplemental papers, plaintiff presents evidence of alleged infractions by Kraujalis that, according to plaintiff, were more serious than the incidents complained

of by Eamer. Plaintiff asserts that Kraujalis's use of the company aircraft to fly Eamer home from vacation was in violation of company policy, which proscribed the use of the aircraft for personal trips. Plaintiff further asserts that Kraujalis later used a company jet to fly Eamer to San Diego for medical treatment shortly after Eamer experienced a heart attack. Plaintiff asserts that Kraujalis made this flight after consuming a glass of wine and notwithstanding that he was not "current" (i.e., had not accumulated sufficient recent flight hours to qualify as pilot) in the aircraft. Plaintiff asserts that, as the younger Kraujalis was not disciplined for these infractions, NME afforded differential treatment to its pilots on the basis of age.

Again, this evidence does not raise an inference that plaintiff was performing his job satisfactorily, especially in the eyes of CEO Eamer. That is, this evidence does not show that Eamer was in fact comfortable flying with plaintiff as pilot-in-command or was not in fact uncomfortable with plaintiff's perceived pattern of uttering falsehoods. Although this evidence certainly suggests that Eamer had tremendous confidence in Kraujalis's abilities as pilot, it does not suggest that he was like-minded about plaintiff's skills, but nonetheless fired plaintiff because he was too old. It is undisputed that plaintiff was responsible for two flight-related incidents that troubled Eamer, that plaintiff lied to Eamer, and that Eamer thought that plaintiff lied to him on another occasion. Based on these facts, plaintiff simply cannot show that he was performing his work satisfactorily.

Further, the cases relied on by plaintiff's counsel on this point do not countenance a different result.[6] In Shager v. UpJohn Co., 913 F.2d 398 (7th Cir. 1990), the plaintiff introduced direct evidence that he was performing satisfactorily and that defendant's assertions to the contrary were greatly exaggerated. For example, the plaintiff there, a sales representative, generated excellent sales in spite of the fact that defendant divided plaintiff's sales territory into two portions and gave the more promising portion to a younger employee. Id. at 399-401. Although plaintiff continued to "best" the younger sales representative, the younger employee was praised while plaintiff was disciplined for an alleged failure to perform "ministerial aspects of his job"-- collecting accounts receivable and managing other sales representatives. Id. Further, plaintiff demonstrated that defendant acted with age-based animus by making several disparaging remarks about the older employees. Id.

This case offers no solace to Bleasdell: Plaintiff certainly cannot characterize flying, or even speaking truthfully to the CEO of the company, as a ministerial aspect of his job. Further, plaintiff here has introduced no direct evidence of age-based animus, as was the case in Shager.

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[6] Although these cases deal with the pretext portion of the burden-shifting analysis, as opposed to the prima-facie-case component, they are discussed at this juncture since plaintiff attempts to use them to demonstrate that he was performing satisfactorily.

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In Rengers v. WCLR Radio Station, 825 F.2d 160, 161 (7th Cir. 1987), the plaintiff, a fifty-one year-old disc jockey, was terminated for his alleged tardiness and "'dead air,' that is periods when no sound was being transmitted over the air." On appeal following denial of defendant's jnov motion, the court found that plaintiff sufficiently demonstrated satisfactory performance since there had been no complaints of tardiness after a reprimand two years prior and since the dead air was the fault of defendant's chief engineer. Id. at 164. Thus, the jury's determination that defendant's proffered reasons were pretextual was sufficiently supported. Id.

Again, this case provides no comfort to plaintiff Bleasdell. He cannot, for example, claim that the Gainsville, Lexington, and San Diego incidents either did not happen or were so remote as to be pretext. Further, responsibility for his errors in the cockpit and for his falsehoods are his and his alone.

Finally, plaintiff's counsel repeatedly invoked the proposition, set forth in Futrell v. J.I. Case, 38 F.3d 342, 349 (7th Cir. 1994), that "[a]n employer's proffered explanation for a discharge does not prevail simply because it contains a true factual predicate." Thus, continues plaintiff, that the three complained of incidents did in fact occur is not sufficient to show that plaintiff was not performing satisfactorily. Although plaintiff is correct on this non-controversial point, plaintiff's ultimate position is not improved since he fails to give Futrell an accurate reading. That is, the point made by the Futrell court is that

"there must be a causal link between the explanation [i.e., the factual predicate] and the discharge." Id. at 349. Thus, the Futrell plaintiff withstood a jnov motion since defendant's proffered reasons, even though factually true, appeared to be catalogued post-termination in "an attempt to justify termination after the fact." Id.

The same cannot be said here: The true factual predicate for Bleasdell's termination is directly and closely linked to his discharge. It is uncontested that Eamer was troubled by plaintiff's performance and by plaintiff's apparent propensity to lie (the factual predicate), that Eamer made his concerns known before plaintiff's termination, and that these concerns were offered as a non-discriminatory explanation for termination. The factual predicate here was not, for example, recalled from some distant memory and dusted off simply for purposes of litigation.

As plaintiff will be unable to meet his burden of showing that he was performing his job satisfactorily, his claim for age discrimination is destined to fail as a matter of law. Therefore, summary judgment must be GRANTED for defendant on this ground.

(ii) SUBSTANTIALLY YOUNGER REPLACEMENT

To meet the fourth element of his prima facie case, plaintiff must show that he was replaced by "another person of similar qualifications generally outside the protected age group." Levy v. Regents of Univ. of Cal., 199 Cal. App. 3d 1334, 1344, cert. denied, 488 U.S. 893 (1988) ; see also

Phipps v. Gary Drilling Co., Inc., 722 F. Supp. 615, 622 (E.D. Cal. 1989) (stating that replacement by employee in protected age group "constitutes probative evidence dispelling age discrimination motive"); Douglas v. Anderson, 656 F. 2d 528, 533-34 (9th Cir. 1981) (granting, directed verdict for employer when replacement merely five years younger).

Here, it appears uncontroverted that plaintiff's replacement, although within the protected age group, was six years younger than plaintiff at the time of his termination. Plaintiff has introduced evidence, again by the declaration of Metz, that, as far as corporate pilots go, a 46 year old pilot is substantially younger than a 52 year old pilot. It thus appears that a triable issue exists with respect to this element and that summary judgment on this alternative ground would be inappropriate.

b. PRETEXT

Assuming arguendo that plaintiff could meet his initial burden of supporting a prima facie case, he would still have to demonstrate that NME's purported nondiscriminatory reason for termination (the three incidents) was pretextual. See Rose, 902 F.2d at 1420. Specifically, plaintiff must show both that defendants' articulated reason was false and that the real reason for termination was discrimination. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993). In determining whether a triable issue of fact is present at this stage, the Court "must consider all the evidence, including that offered to establish the prima facie case[]."

Wallis v. J.R. Simplot, 26 F.3d 885, 892 (9th Cir. 1994). "If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." Id. at 889. However, "when evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case." Id. at 890-91.

As discussed above, plaintiff is unable to meet the first prong of the pretext test (falsity) since it is undisputed that the three incidents did in fact occur.

Further, plaintiff's various attempts to satisfy the second prong of the pretext test (that the real reason was discrimination) also fail.

Plaintiff first states that his past good performance and evaluations raise a triable issue on whether NME's reasons were pretextual. As discussed above, the lack of criticism of plaintiff appears to be due, in part, to Metz's failure to perform his job. Similarly, plaintiff also suggests that the delay between the cited incidents and plaintiff's termination indicates pretext. This again would not appear to raise a genuine issue since the delay appears to have been caused by Metz's failure to report the incidents. That is, plaintiff has not controverted defendant's evidence that the termination took place shortly after Eamer finally learned of the Gainsville incident. (Kraujalis Supp. Decl. ¶ 3.)

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Second, plaintiff suggests that NME's "exaggeration" of the significance of the various incidents indicates pretext. As evidence of exaggeration, plaintiff again relies on the declaration of Metz. As Metz was terminated in part for his failure to discipline pilots, it would not appear that his opinion on the significance of plaintiff's mishaps is particularly helpful to plaintiff's case. Moreover, as discussed above, a mere difference in opinion of a co-worker or supervisor, which is based on undisputed facts, does not suggest that triable issues exist. See Dey, 28 F.3d at 1460; Anderson, 13 F.3d at 1125; Williams, 856 F.2d at 924.

Plaintiff next contends that Kraujalis had a duty to report any perceived inadequacies in plaintiff's abilities to Metz, and that plaintiff's termination based on unreported incidents is evidence of pretext. Plaintiff neglects, however, to offer any evidence of such a duty on Kraujalis's part. Additionally, plaintiff suggests that Eamer never advised Metz to terminate plaintiff for dishonesty, and that this again is evidence of pretext. It is, however, undisputed that Eamer had Metz himself demoted shortly after learning of the dishonesty, in part for Metz's failure to report the incidents.

Plaintiff's fourth point in support of his pretext theory (that the incidents were not serious enough to warrant termination) is again a mere difference of opinion and is dealt with, in various places, above.

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Plaintiff next contends that NME's failure to follow its own termination procedures is evidence of pretext. Plaintiff cites NME's policy of "progressive discipline" and then suggests that less drastic measures should have been taken before termination. By selectively quoting from NME's employment policy, plaintiff fails to recognize that the progressive discipline policy is "discretionary[,] as there may be situations where . . . immediate termination is necessary." (Metz Decl., Ex. E.) Thus, NME did not fail to follow its own procedures.

Plaintiff next suggests that NME's conflicting reasons for discharging plaintiff (management reorganization, resignation, and dishonesty) show pretext. These reasons are not "conflicting," as each is in fact accurate. It is uncontested that the management of the aviation department was reorganized, that plaintiff did agree to "resign" in exchange for a severance package, and that Eamer did want plaintiff ousted in part for dishonesty.

Plaintiff's seventh point (delay in asserting poor performance) is also discussed elsewhere in this memorandum and order. Plaintiff's eighth and ninth points (inconsistencies in defendant's evidence and the alleged failures to recall specific facts) largely amount to differing opinion over the import of uncontested facts or to mischaracterization of the evidence itself. Plaintiff's similar argument, that Kraujalis's use of "rigid" and "autocratic" to describe plaintiff amounts to using "code words" for aged-based animus, fails for the same reason. See also Rose, 902 P.2d at 1423 (stating that triable issue not raised by

proof of defendant's use of colloquial expressions unrelated to protected characteristic); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (stating that such "stray remarks" do not raise triable issue as to pretext). Plaintiff's tenth and final point (that younger pilots, particularly Kraujalis, were treated differently) is also treated elsewhere.

Assuming arguendo that he could make a prima facie showing, plaintiff has failed to introduce sufficient evidence to show that defendant's nondiscriminatory reason for terminating plaintiff's employment is pretextual. Plaintiff has not demonstrated a triable issue as to the falsity of defendant's proffered non-discriminatory reasons. Further, although plaintiff has pointed to many facts and has offered up many theories, nothing introduced appears to indicate, directly or by reasonable inference, that plaintiff was terminated because of his age. Thus, on this alternative ground, summary judgment is also hereby GRANTED in favor of defendant on plaintiff's ADEA claim.

Lastly, to the extent that plaintiff alleges age discrimination under the FEHA, this claim fails for reasons set forth above. See Mixon v. Fair Employment & Housing Comm'n, 192 Cal. App. 3d 1306, 1316 (1987); County of Alameda v. Fair Employment & Housing Comm'n, 153 Cal. App. 3d 499, 504 (1984).

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V. CONCLUSION

Perhaps defendant did overreact in firing plaintiff over the three incidents identified above. It is also possible that plaintiff's trustworthiness should not have been called into question based on his behavior as described herein.

Nevertheless, it is uncontroverted that the underlying events occurred and that they troubled the defendant employer. Absent any proof, direct or circumstantial, that plaintiff was fired because of his protected characteristic, this Court must allow defendant to exercise its discretion in making employment decisions and must not "sit as a super-personnel department [and] reexamine[] [defendant's] business decisions." Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987).

SO ORDERED.

Dated: August 28, 1995

/s/
LOURDES G. BAIRD
United States District Judge

Appendix C

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING FILED NOVEMBER 7, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 7 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID K. BLEASDELL,
Plaintiff-Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant-Appellee.

No. 95-56470
D.C. No. CV 94-01989-LGB

ORDER

Appendix C

Before: SCHROEDER, FERGUSON, and LEAVY, Circuit Judges

Judge Schroeder and Judge Ferguson have voted to deny the petition for rehearing. Judge Leavy has voted to grant the petition.

Judge Schroeder has voted to reject the suggestion for rehearing en banc. Judge Ferguson has recommended rejection. Judge Leavy has recommended acceptance of the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no judge of this court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
MAR 9 1998
OFFICE OF THE CLERK

97-1288
No.

In The Supreme Court of the United States

OCTOBER TERM 1997

NATIONAL MEDICAL ENTERPRISES, INC.,

Petitioner,

v.

DAVID K. BLEASDELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Plaintiff David K. Bleasdell's claim alleges that NME violated the Age Discrimination In Employment Act, 29 U.S.C. 626(b), by terminating him because of his age. The Ninth Circuit Court of Appeal reversed the District Court's grant of summary judgment in favor of the defendant, National Medical Enterprises, Inc. (hereafter, "NME").

In August 1980, Bleasdell became employed as a corporate pilot and mechanic at NME. [CR 58,3] He worked there for approximately 11 years with good performance reviews, regular merit raises, promotions and no discipline. [CR 32; CR 58, 19-20, 3-4,7-9,11] He was terminated involuntarily on January 17, 1992 without prior notice. [CR 58, 12, Ex F]

At the time of termination, Bleasdell was the oldest pilot in the Department, at 52 years old. [Id., 39] Robert Metz was second oldest, at two months short of 48 years old. [CR 26, 5] The decision to terminate was made by Walter Kraujalis, who was approximately 35 years old. [Id., 40; CR 20, 10]

Approximately one year prior to termination, in late 1990, NME acquired a new jet, the Gulfstream III. [CR 32, 17 at 7:20-26, 20 at 9:16-21] In late 1990, NME's Aviation Department Manager, Robert Metz hired Walter Kraujalis as an independent contractor to help train NME pilots in the new aircraft. [Id., 16-17,19,21, and Ex. C.] In February, 1991, Metz hired Kraujalis as an NME employee to serve as a pilot and to

further train NME pilots on the new G-III. [CR 32 17, Ex C]

At NME, Kraujalis became acquainted with NME's Chief Executive Officer--Richard Eamer. Eamer paid Kraujalis' tuition for law-school, allowed him to work part-time, and excused attendance of the Department's weekly pilot's meetings. [CR 32, 4-5,38; CR 42, 34]

In January, 1992, Eamer demoted Robert Metz and made Kraujalis the new Department Manager. [CR 25, 3-4] Approximately two weeks later, Kraujalis fired several employees, including Bleasdell. [Id.] The verbal reason given was a "reorganization." [CR 58, 12] However, NME's Personnel Change Notice stated Bleasdell had "resigned to pursue other interests." [Id.,12, Ex. F]

In support of its motion for summary judgment, NME submitted evidence of Kraujalis stating that he fired Plaintiff for dishonesty and because Plaintiff was a poor pilot. [CR 20, 10; CR 25, 4; CR 61 at 222]

Kraujalis said he relied upon two purported incidents of dishonesty. The first occurred during a landing at Lexington, 9 months before termination, ("the Lexington landing"). Bleasdell made a hard landing while carrying Eamer as a passenger in the new G-III. The plane bounced several feet back into the air. Instead of immediately completing the landing with marginally sufficient runway, Bleasdell elected to go-around for a second approach. Bleasdell completed the

second landing without difficulty. Nevertheless, during the second attempt, Kraujalis observed Bleasdell tell a "lie". Moments after the bounce and Bleasdell's election to go around, Eamer shouted up from the cockpit demanding an immediate explanation. Plaintiff, in Kraujalis' presence, told the engineer to tell Eamer that something had blown across the runway. That was untrue. [Compare CR 20, 6; CR 58 at 5-26; CR 32, 22]

As to the second incident, Kraujalis states that Eamer overheard Bleasdell tell the NME's travel department, during a telephone call, that Bleasdell was "5 minutes late" to the airport, when, according to Eamer, Bleasdell had been 40 minutes late. Bleasdell insists that Eamer, who is deaf, misheard the conversation. [Compare CR 20, 8; CR 58, 10-11; CR 32,33-35]

Kraujalis also states that he terminated plaintiff based upon his opinion that Plaintiff was a mediocre pilot, lacked emergency skills, was "rigid", "autocratic", and "just wasn't loose." [CR 61 at 113:1-20]. He offered two incidents supporting his conclusion.

The first incident involved a hard landing by another pilot at Gainsville, Georgia in July, 1990. Plaintiff was allowing his co-pilot, Andy Higgins, to land the aircraft when Higgins experienced several hard bounces and seemed unable to regain full control. Bleasdell took control and safely completed the landing. [CR 58, 9 Ex D; CR 60 at 272-284]

Following this incident, the co-pilot was restricted and ordered to receive remedial training; Bleasdell, in contrast, was not found to be at fault. [CR 58, 9; CR 32, 26-29, 42, Ex D] This incident occurred several months before Kraujalis came to NME. After joining NME, Kraujalis never spoke with Bleasdell, Higgins or Metz concerning Bleasdell's performance at Gainsville. [CR 32, 26-29, 42, Ex D; CR 61 at 67, 69, 78.] However, Kraujalis states that, after his promotion, he reviewed Bleasdell's one page report, and concluded Bleasdell should have acted sooner. [CR 25, 4; CR 20, 9; CR 32, Ex D].

The second incident was the landing at Lexington in April, 1991, discussed above.

These two landings had occurred 8 months and 16 months respectively prior to termination on January 17, 1992. It is undisputed that during the 8 months prior to Bleasdell's termination, he landed NME aircraft, including the new Gulfstream III many times, all without any problem or incident whatsoever. [CR 58, 8; CR 32, ¶¶ 20-21; CR 61, 222]

Petitioner repeatedly describes the two hard landings as "near crashes". That phrase is a grossly inaccurate and unsupported misrepresentation. Although imperfect, neither landing was an emergency and neither involved any damage or injury. [CR 60, at 273-282; CR 58, 8-9; CR 32, ¶¶ 19-21, 30-31. D; CR 61, 78, 132-133, 179:20--181]

The trial court granted summary judgment for Petitioner, ruling that no issue of discriminatory termination was raised. [CR 49 at 15-21 (satisfactory performance); Id. at 23-26 (pretext)] The Ninth Circuit Court of Appeal reversed, holding that Bleasdell had produced substantial evidence supporting both his prima facie case and the falsity of NME's explanation, and that these together raised a reasonable inference of discrimination, thus making the issue of whether NME's motives were discriminatory a triable one for the factfinder. Petition, Appx. A.

II. REASONS FOR NOT GRANTING CERTIORARI

A. NME'S "SUPERVISOR" ARGUMENT SEEKS TO MISCHARACTERIZE A FACT INTENSIVE ISSUE AS A DEBATE OVER IMPORTANT QUESTIONS OF LAW.

NME defines this issue as follows:

"Whether a former supervisor's disagreement with an employer's decision to terminate an employee creates a triable issue of fact as to whether the employer's stated reasons for the employee's termination were false, where the supervisor does not refute the facts of the case."

The supervisor to which NME refers is Robert Metz. Metz was Plaintiff Bleasdell's supervisor

throughout all of the "incidents" mentioned by Kraujalis. It was Metz's job duty at NME to evaluate Plaintiff's performance both generally and with respect to the incidents. Metz sets forth his evidence in a declaration in excess of 18 pages in length plus exhibits. (See Metz Declaration at C.T. 32) Petitioner has conspicuously failed to include that declaration it it's Appendix. Rather, Petitioner chooses instead to merely characterize its contents as expressing "mere disagreement" with NME's reasons for termination. That characterization is plainly inaccurate. Given that Petitioner's key premise is its construction of what Metz stated, it was Petitioner's duty to include the declaration in Petitioner's Appendix in order to enable the Court to confirm whether that premise was accurate. See Rule 15(i)(vi).

Here, Petitioner misrepresents both the evidence within Metz's declaration and the Court of Appeal's use of that declaration. We discuss these points below:

1. It is untrue that the Ninth Circuit decision in this case relied upon supervisor Metz's mere "disagreement" with NME's decision as its basis for finding pretext. The Court's appellate opinion never stated or suggested that a supervisor's mere "disagreement" with the employer's decision is sufficient to show pretext. On the contrary, the Court stated as follows:

> "In particular, while the declaration from Metz acknowledges that the landing incidents

cited occurred, it disputes that they were truly the basis for Bleasdell's termination.

> "A former supervisor who is personally aware of the facts cited by an employer to justify its decision to terminate a plaintiff can offer important insight into whether the reasons offered by the defendant were pretextual. Very rarely can a plaintiff find direct evidence of intent. This is especially true when defending against an employer's motion for summary judgment. Metz's declaration creates a triable issue as to whether the stated reasons for Bleasdell's termination were false. That is a decision which must be left to the finding of fact."
>
> [Petition, Appx. A, pg. 8a]

In short, the Court of Appeal never adopted the blunt misstatement of law which NME now attributes to it--i.e. that Metz's mere disagreement with NME's decision was sufficient evidence of pretext. The actual issue raised by the Court of Appeal decision is routine and fact-intensive: Whether Metz's declaration, considered alone or with the other evidence, was sufficient to support a factual finding that NME's purported reasons for termination were not truthful. NME's misstatement of the actual issue is significant for purposes of its Petition. Here, no important rule of law need be determined. In order to justify the extraordinary relief that NME now seeks, we respectfully submit that more is necessary than NME's disagreement with the

Court below over whether evidence was sufficient to support a finding of fact.

2. It is untrue that Metz's declaration merely "disagree[ed] with the employer's decision." We agree that declarations of a plaintiff, co-worker or supervisor which merely state conclusions that plaintiff's performance was satisfactory, or which express mere disagreement with the employer's decision to terminate, are rationally insufficient without more to show that that the employer's assessment was dishonest. Dey v. Colt Const. & Development Co. 28 F.3d 1446, 1460-1461 (7th Cir. 1994); Anderson v. Baxter Health Care Corp., 13 F.3d 1120, 1125 (7th Cir. 1994); Williams v. Williams Elec., Inc. 856 F.2d 920, 924 (7th Cir. 1988) Here, in contrast, Metz supplied far more than conclusory "disagreement" with NME's decision. On the contrary, Metz's declaration supplied both specific facts and relevant expert opinions based upon those facts which rationally challenge the genuiness of NME's proffered reasons for terminating Bleasdell. See Dey, Supra; Weldon v. Craft, 896 F.2d 793, 799 (3rd Cir. 1990); Shager v. Upjohn Co., 913 F.2d 398, 400-401 (7th Cir. 1990)

We submit that pretext may be shown by evidence demonstrating, "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them`unworthy of credence.' " Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

According to NME, Kraujalis' decision to terminate Bleasdell was based upon his good faith application of professional standards of aviation management to the facts surrounding the three "incidents" which Kraujalis describes.

Because Metz had actually investigated each "incident" as part of his own professional duties as Defendant's manager, he possessed substantial relevant information concerning those incidents. Moreover, because Metz was himself a 30 year veteran pilot and administrator, he was uniquely qualified to tender both facts and expert opinions concerning the genuiness of Kraujalis' decision process in connection with those incidents.

Metz's declaration specifically described the facts and circumstances surrounding each of the three incidents in question--incidents that Metz had himself investigated for NME. Metz showed that Kraujalis' version of those incidents was highly exaggerated and distorted.

Metz's declaration also specifically analyzed Kraujalis' decision process as revealed in Kraujalis' deposition and declaration. Metz showed facts permitting a finding that Kraujalis made no serious, good faith effort to obtain the true facts about the very "incidents" he relied upon. Metz showed that Kraujalis ignored obvious, specific sources of facts which any aviation administrator, acting in good faith, would have considered. Further, Metz showed that Kraujalis' highly

adverse conclusions were grossly unsupported by the sources upon which Kraujalis purported to rely.

Thus, Metz's evidence did not merely "disagree" with Kraujalis' business judgment; it also set forth specific facts and expert opinions demonstrating weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Kraujalis' proffered legitimate reasons for terminating Plaintiff, such that a reasonable factfinder could rationally find them`unworthy of credence.' See, Fuentes, supra, 32 F.3d at 765.

3. NME's statement that supervisor Metz "does not refute the facts of the case" is materially misleading. For NME, the "facts of the case" are very few. They include only the physical occurrence of the questioned landings and the bare fact that the disputed telephone conversation occurred. NME broadly applies the "business judgment rule" to exclude as irrelevant all other facts and evidence surrounding those bare events (ostensibly because the "correctness" of NME's interpretation of those incidents is not at issue). Under this view, if Metz confirmed that the questioned landings and one disputed telephone conversation occurred, pretext is conclusively disproved.

Yet, while pretext does not directly focus upon the "correctness" of the employer's reasons, it does focus upon the "genuineness" of those reasons. And in making that key determination, the facts and circumstances surrounding the "incidents" obviously may be relevant. By advocating that those facts and

circumstances are irrelevant to pretext, NME throws the baby out with the bath water.

Just as a genuine decision may be based upon mistaken facts, so too a phony decision can be explained on the purported basis of the employer's version of undisputed facts. Futrell v. J.I.Case (1994) 38 F. 3d 342, 349. Common sense informs us that employers are sometimes willing to cull undisputed adverse facts from an employee's record and untruthfully assert them as the reason for a termination actually motivated by other undisclosed factors.

The evidence supporting such mendacity is generally very difficult to uncover even in meritorious cases. Surely then, pretext analysis cannot disregard evidence which circumstantially shows such mendacity to be probable. Metz's declaration provided the Court with an evidentiary basis for such scrutiny.

In short, the Court of Appeal did not hold that a supervisor's mere "disagreement" with the employer's decision is sufficient to establish that an employer's reason for its adverse decision was pretextual. That "issue" is a straw man. The true issue is and was whether Metz's declaration, alone or with other evidence, constituted substantial, probative evidence that the purported incidents and reasons tendered by NME were not the genuine reasons for its decision. This is a fact intensive issue--not a controversy over an important rule of law. We submit that the Ninth Circuit not only addressed the correct issue, but decided it

correctly. A revisiting of that issue by this Court would be a significant waste of scarce judicial resources.

B. THIS CASE IS A POOR VEHICLE FOR REVIEWING NME'S "SUPERVISOR" ARGUMENT.

Aside from Metz's declaration, there was abundant other evidence which supported a finding that NME's reasons for termination were pretextual. Because the Court of Appeal was required only to determine whether sufficient evidence existed to withstand summary judgment, it was not required to discuss that additional evidence. Thus, even if Metz's declaration were itself deemed insufficient evidence of pretext, there would remain the question of sufficiency of the other evidence on that same issue.

We summarize several examples of this evidence that focuses upon Kraujalis' reliance upon "poor piloting" as a reason for termination:

1. In January 1992, it is undisputed that NME demoted Robert Metz from his position of manager of the aviation department and replaced him with Walter Kraujalis. Within days of his assuming the role of manager, Kraujalis terminated Bleasdell. At that time, Bleasdell was the oldest pilot in the Department, at 52 years old. [Id., 39] Metz was second oldest, at two months short of 48 years old. [CR 26, 5] Kraujalis was approximately 35 years old. [Id., 40; CR 20, 10]

2. At the time of his termination, in January, 1992, Bleasdell had served as an NME pilot for over ten years. During that time nobody had ever informed Bleasdell that he had any serious deficiencies in his piloting skills--not Eamer, Kraujalis, Metz or anyone else. [Bleasdell Depo. p.273-282; CR 58, ¶¶5-7, 9, 11-12; CR 61 at 78:17-20, 132-133:3-23; see also Metz Decl., CR 32, ¶¶ 16-17, Ex C and ¶¶30-31,38, Ex D]

3. Throughout 1991, Metz required that Kraujalis serve as both a pilot and a trainer, familiarizing pilots including Bleasdell on the new G-III. [CR 32, 16-17, Ex C] Kraujalis states he observed Bleasdell during 28 flights during that period. [CR 20 5 at 3:4] It is within this context that Kraujalis now purports to have then observed mediocre piloting, lack of "emergency skills", "rigid" piloting, [CR 32, 40; CR 61 at 113:1-20, 130, 179:20-180:9] Yet, it is undisputed that he never disclosed these observations through normal channels--channels that would have afforded Bleasdell a chance to respond and/or improve. He never informed Metz, the Department Manager, whose job was to maintain safe standards and who had to rely upon receipt of such reports. [CR 61 at 78:17-20, 132:25-133:1-23; CR 32, 19, 21] Nor did he inform Bleasdell. [CR 58, 5 at 2:4-16, 6 at 4:4-12, 7 at 4:20-24, 11-12

4. Juxtaposed with this strange silence is a dubious volunteerism. Kraujalis conveys his critical opinions about Bleasdell to CEO Eamer--a non-pilot, and frequent passenger--during private conversations. These two individuals had a private relationship; Eamer

was putting Kraujalis through law-school and allowing him to work part-time. [CR 42, 34; CR 32, 4-5,38] Most tellingly, Kraujalis ("in late 1991") even offered Eamer criticism about Bleasdell's performance at the Gainsville landing of July, 1990--an event that occurred months before Kraujalis joined NME. [CR 20, 4] At such meeting, Kraujalis had no reliable facts about Bleasdell's performance at Gainsville; he hadn't even read Bleasdell's one page memo, which he later claimed to rely upon exclusively. [CR 20 (compare 7 & 9)]

5. The second of the two "hard" landings which Kraujalis faults (the "Lexington landing") occurred in April, 1991. [Compare CR 20, ¶5 and CR 58, ¶5-6] During the nine months between that landing and his termination in January, 1992, Bleasdell landed the same aircraft (NME's new Gulfstream III) many times--all without a single unusual incident. [CR 58, 8; CR 32, ¶¶ 20-21; CR 61, 222]

6. Kraujalis testified as to Bleasdell's qualities as a pilot that supported his decision to terminate him. The testimony supports an inference that Kraujalis' view of Bleasdell was influenced by age based stereotypes. Kraujalis viewed Bleasdell as "an autocrat." "He just wasn't loose." "He was rigid in certain situations." [CR 61 at 113:1-20]. Prior to his promotion, Kraujalis had conversations about Bleasdell with three other pilots about Bleasdell--Adler, McKenzie and Higgins--all substantially younger than Bleasdell. Kraujalis said that these pilots agreed with him that Bleasdell was "autocratic" and "rigid." [CR 61 at 132, 198]. Asked to explain these qualities in more

detail, Kraujalis said that Bleasdell was unreceptive to dialogue in the cockpit about specific maneuvers or the flight in general. [CR 61 at 130] Yet, Kraujalis was unable to recall any actual occurrence when Bleasdell displayed an "autocratic" quality. [Id. at 131:6-10] Kraujalis was likewise unable to recall any specific instances where Bleasdell was unresponsive to dialogue. [Id. at 130:7-25] Likewise, despite his status as company "trainer", Kraujalis admitted that he never noted or recorded any incident of Bleasdell being rigid, autocratic or unresponsive to input. [Id. at 130:22-131:1-7] (This evidence tended to corroborate Metz's declaration, which stated that Kraujalis generally appeared uncomfortable interacting with the older pilots, particularly Bleasdell and Metz. [CR 32, 40] Metz observed that Kraujalis usually expressed reluctance to accept either Metz or Bleasdell's verbal input, suggestions and comments about aviation. [Id] Metz noticed that Kraujalis acted more coldly when interacting with older pilots than with younger pilots. [Id.])

7. At the time of termination, NME had an express policy of progressive discipline. [CR 32, 36, Ex E,F] Kraujalis was aware of this policy but decided not to apply it to Bleasdell. [CR 61 at 190, 222] Kraujalis testified that he refused to allow remedial training to improve Bleasdell's allegedly "mediocre" piloting skills, as an alternative to termination. [CR 61 at 199] Kraujalis testified that he had concluded that Bleasdell "wouldn't make a significant improvement." [CR 61 at 199] Asked at deposition to explain, Kraujalis answered that you had to be a pilot to understand. [Id.] He said

that the factors were subtle and based upon years of experience. [CR 61 at 200]

We do not summarize the substantial additional circumstantial evidence of pretext. Our point is that, to merit the extraordinary relief sought, Petitioner is required to show the importance of the issues for which it seeks review. Yet, the Petition neither denies nor addresses the plethora of evidence other than Metz's statements about the "incidents" which supports a finding of pretext. Rather, Petitioner simply ignores that additional evidence, never demonstrating that it was insufficient on that issue. Hence, Petitioner has failed to establish any substantial prejudice flowing from the asserted insufficiency of the Metz declaration. At a minimum, scrutiny of Plaintiff's additional evidence would be necessary to determine the effect of the claimed error. Hence, this case does not provide a good vehicle for reviewing the sufficiency of Metz's declaration, even assuming that task was sufficiently important for this Court to undertake.

C. THIS CASE IS NOT A CONVENIENT OR APPROPRIATE VEHICLE FOR CONSIDERING THE LEGITIMACY OF THE "PRETEXT-PLUS" APPROACH.

Under the "pretext-plus" approach, a plaintiff at the summary judgment stage is not only required to produce evidence which shows plaintiff's prima facie case and the falsity of the employer's reasons for termination, but is also required to produce yet additional evidence showing that the false reason was

tendered as a pretext for discrimination. The pretext-plus approach assumes that the prima facie case, coupled with substantial evidence that the employer's reason is false, are together insufficient to rationally permit the factfinder to infer that discrimination has occurred. Petition, District Court opinion, Appendix B, 40a-41a (even assuming prima facie case, plaintiff must "show both that defendants' articulated reason was false and that the real reason for termination was discrimination").

Respondent submits that the doctrine of "pretext-plus" is a meritless doctrine and that its disavowal is an important task for this court. Nevertheless, Respondent also submits that the present case--in which the Ninth Circuit rejected the doctrine of pretext plus--is an inferior vehicle for addressing that doctrine. A better case would involve a plaintiff has been denied the right to trial, notwithstanding that they produced substantial evidence of both a prima facie case and the falsity of the employer's reasons. It is the destructive aspects of applying pretext-plus--rather than its appropriate rejection--which render that doctrine sufficiently "important" for this Court's consideration.

1. Petitioner's Advocacy For "Pretext-Plus" Is Based Upon A Misreading Of The Hicks Decision.

Petitioner refers variously to both (1) this Court's use of "seemingly inconsistent language" in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); and (2) the

Appellate Court's misreading of Hick's "seemingly clear" upholding of pretext-plus. Respondent submits that Petitioner's own seeming inconsistency stems from its failure to recognize the difference between the respective burdens placed upon the courts, on the one hand, and the factfinder, on the other. That is, Petitioner does not distinguish between the fact-proponent's (1) burden of producing sufficient evidence to reasonably support a finding that an ultimate fact is true, and (2) his or her burden of actually persuading the factfinder that an ultimate fact is true. While courts oversee the first burden, factfinders decide the latter. (C. McCormick, Evidence (West, 4th ed. 1992), §§336-339).

It is hornbook law that evidence may be sufficient to permit the factfinder to find the ultimate fact, but not sufficient to compel the factfinder to do so. (McCormick, supra, §349, pg. 575). As McCormick points out,

> "Thus, it is entirely consistent for a court to hold that a party's evidence is sufficient to withstand a motion for directed verdict [or to withstand summary judgment] and yet to uphold a verdict for its adversary."
>
> [§349, pg. 575]

In other words, where the evidence supports conflicting but reasonable inferences about whether the ultimate fact (i.e. decision motivated by discrimination) is true, the decision is one for the factfinder, not the court.

Hicks clearly recognized this basic distinction between the respective burdens of court and factfinder. There, this Court addressed a trial record which contained evidence sufficient to reasonably support a finding of both plaintiff's prima facie case and that the defendant's explanation was pretextual. Yet, the trial court (sitting in bench trial) ultimately found that it was not persuaded that discrimination had occurred and awarded a trial verdict for defendant. (509 U.S. 506, 509)

The Supreme Court upheld the trial verdict for defendant, while at the same time emphasizing that (given the evidence of both the prima facie case and of pretext) the factfinder could have legitimately decided the issue of discrimination either way.[1]

---

[1] In Hicks, the court of appeals reversed the trial courts verdict, concluding that "[o]nce plaintiff proved all of [the employer's] proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992), reversed, 509 U.S. 502 (1993). It was this holding which the Supreme Court reversed, concluding that judgment for the plaintiff is not compelled by the disbelief of the employer's reasons. 509 U.S. at 511. At the same time, however, the Court also explicitly stated that a finding that the reasons proffered are pretextual permits the factfinder to draw the inference that the defendant intentionally discriminated against the plaintiff. Id.

Addressing plaintiff's burden of persuasion, the Court made clear that even if the factfinder found in favor of plaintiff with respect to both the elements of the prima facie case and pretext, the factfinder nevertheless must specifically find that discrimination has occurred, in order for liability to attach. As the Court stated, "it is not enough to disbelieve the employer," 509 U.S. at 519, and the plaintiff must show "both that the reason was false, and that discrimination was the real reason," Id. at 515.

Nevertheless, addressing plaintiff's burden of producing evidence, the Court stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. The Court explained that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," and continued: "the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" Id. at 511 (emphasis added) (quoting Hicks, supra, 970 F.2d at 493)."

In short, as did Professor McCormick, the Hicks Court determined that it was entirely consistent for a court "to uphold a verdict for the defendant", despite the fact that the plaintiff's "evidence is sufficient to withstand a motion for directed verdict [or to withstand summary judgment]." (McCormick, supra).

The Ninth Circuit decision in Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1996)--upon which the Court of Appeal relied in the present case--interpreted Hicks as holding as follows:

> At trial, [plaintiff] must prove "both that the [employer's stated] reason was false, and that discrimination was the real reason." [citing Hicks] However, if [plaintiff] persuades the jury that the defendant's alleged reason is false, then "[t]he factfinder's disbelief of the reasons put forward by the defendant...together with the elements of the prima facie case...will permit the trier of fact to infer the ultimate fact of intentional discrimination, and no additional proof of discrimination is required." [citing Hicks] Thus to survive summary judgment, [plaintiff] is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude--based on [plaintiff's] prima facie case and the factfinder's disbelief of [defendant's] reasons for discharge--that discrimination was the real reason for [plaintiff's] discharge.

Nidds, 113 F.3d at 918, fn. 2 (emphasis in original). Petitioner claims that the above language shows that the Nidds Court "ignored" Hicks. In contrast, we submit that this language demonstrates a clear understanding of both Hicks and the differing functions of courts and factfinders in our system.

2. Pretext-Plus Is Based Upon The False Assumption That The Prima Facia Case Lacks Substantial Probative Value On The Issue Of Discrimination.

Respondent agrees that "pretext-plus" is an important doctrine, in that its application reverses sub-silentio McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and its progeny. McDonnell Douglas and subsequent cases defined both a set of presumptions and a structure of threshold factual findings, which when satisfied, create a triable issue of discrimination. Those innovations were based upon this Court's recognition that, while discrimination clearly exists, it is extremely difficult to prove, and that "smoking gun" evidence is usually unavailable. When pretext-plus is applied in summary judgment or directed verdict proceedings, it substantially defeats the McDonnell Douglas structure and renders impracticable plaintiff's reliance upon circumstantial evidence in discrimination cases.

The fundamental defect of pretext-plus is that it inherently assumes that--following plaintiff's introduction of substantial evidence that the employer's stated reason is false--plaintiff's prima facie case fails to retain substantial probative value on the issue of discrimination.

The initial presumption of discrimination raised by plaintiff's prima facie case arises not only from the public policy aim to "help plaintiffs prove difficult

cases." Rather, the presumption arises primarily from reasonable probabilities--the same bedrock upon which inferences derive. As Chief Justice, then Justice, Rehnquist has explained, the initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added).

Justice Rehnquist continued:

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. Id.

Where the employer counters plaintiff's evidence of the prima facie facts with evidence of a non-discriminatory reason for its decision (as it is required to do to avoid a compelled finding of liability) we no longer presume discrimination. This is because the probabilities are then substantially altered--that is, such evidence tends to reduce the likelihood of discrimination to a level below "more likely than not".

Pretext, like the prima facia case, has probative force because of our general knowledge of how the world works. Our experience tells us that the employer's falsity in explaining its reason for decision makes it more likely than not that its true reason was an impermissible one. As the Second Circuit recently remarked in the context of an employment discrimination case: "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct." Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995); see also 2 Wigmore § 278(2) (Chadbourne Rev. 1979).

Thus, where the plaintiff has countered the employer's stated reason with substantial evidence that this reason is false (as plaintiff is required to do to avoid a compelled finding of non-liability) the previous presumptions of both discrimination and non-discrimination fall away. Nevertheless, at that juncture the probative value derived from the prima facie case not only remains, but is augmented. This follows both rationally and necessarily because,

a. The evidence of pretext permits the factfinder to rationally reject the employer's stated reason.

b. If the factfinder does choose to reject the employer's stated reason as false, it follows that the factfinder can rationally disregard the undermining probative force which that reason otherwise might have

exerted upon the prima facie case. In other words, the factfinder can then rationally accord the prima facie facts their full, original probative value--unfettered by the undermining probative force of the employer's stated reason. It can rationally draw from those prima facie facts the same inferences that Chief Justice Rehnquist explicitly described in Furnco Construction.

c. Further, a factfinder who chooses to reject the employer's stated reason as false can rationally accord probative value to that false proffer--i.e. can (but is not required to) recognize the increased likelihood that the employer's true reason is an impermissible one. Moreover, the factfinder may rationally find probative value in the fact that the employer's false tender was in response to a specific and formal allegation of discrimination. Thus, the factfinder may find a connection between the discrimination alleged and the employer's probable motive for responding falsely—i.e. that the employer's true reason is a discriminatory one.

d. Finally, this same factfinder can then rationally find that both the prima facie facts and employer's falsity rationally point in the same direction--i.e. the factfinder can recognize that the combination of these two sets of facts substantially augments the likelihood that the employer's true reason is discriminatory.

In short, having produced substantial evidence of both the prima facie facts and pretext, the plaintiff has supplied evidence which rationally increases the probability of discrimination to a level not merely equal

to but greater than existed prior to the employer's articulation of a stated reason.

We submit that in Hicks, this Court implicitly recognized these points when it stated that the prima facie facts coupled with the factfinder's disbelief of the employer's reason will permit the factfinder to infer the ultimate fact of discrimination, 509 U.S. at 511, even though the presumption of discrimination "drops from the case" after the employer proffers a legitimate reason for its actions. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

Pretext-plus runs directly counter to the reasoning of Hicks because it inherently presumes that plaintiff's substantial evidence supporting the prima facie facts, coupled with substantial evidence of pretext, are together insufficient to permit the factfinder to infer the ultimate fact of discrimination. Under pretext-plus, a meritorious plaintiff who has produced substantial evidence supporting both (1) his or her prima facie case and (2) the falsity of the employer's reasons is then asked: "Okay. Now, where is your 'smoking gun'?"

In short, pretext-plus construes the McDonnell Douglas structure as a mere formalist preface to the problem of showing discrimination--imposing substantial obstacles but providing no real guidance about what threshold facts will permit plaintiff to get to a jury. The application of pretext-plus, by those Courts which have adopted it, effectively creates a "catch-22" which prevents meritorious discrimination cases from reaching trial, where those cases are based upon

circumstantial evidence. For these reasons, Respondent certainly agrees that the "issue" of pretext-plus raises important concerns worthy of this Court's attention.

Nevertheless, despite the undisputed importance of this "issue", plaintiff's case is not an appropriate vehicle for addressing it. Conservation of this Court's judicial resources suggests that the optimal circumstance for addressing pretext-plus is where it causes harm. In this case, the Ninth Circuit rejected the notion that pretext-plus defines Plaintiff's burden of producing evidence at the summary judgment stage. In short, this case does not present the situation that makes "pretext-plus" significant--its application as law.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be denied

Respectfully submitted,

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